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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000251/2023

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Held in Edinburgh on 22, 23, 24 January 2024 and in chambers on 6 March 2024

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**Employment Judge J Shepherd
Tribunal Member J Clewlow
Tribunal Member A Matheson**

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Mr Robin Maxwell

**Claimant
In Person**

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Tesco Stores Ltd

**Respondent
Represented by
Mr J McHugh
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is:

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1. The claim of direct disability discrimination is dismissed.
2. The claim of failure to make reasonable adjustments succeeds and the respondent is ordered to pay to the claimant an injury to feelings award in the sum of £5,000.

E.T. Z4 (WR)

3. The claim of harassment related to disability was brought outside of the relevant time limit and the Tribunal does not have jurisdiction to consider it, so it is dismissed.
4. The claim of victimisation was brought outside of the relevant time limit and the Tribunal does not have jurisdiction to consider it, so it is dismissed.

REASONS

Introduction

1. The claimant commenced ACAS Early Conciliation on 17 April 2023 and the certificate was issued on 29 May 2023. The claimant presented claims for direct disability discrimination, a failure to make reasonable adjustments, harassment related to disability, and victimisation on 31 May 2023. The respondent submitted an ET3 response form in which they resisted all claims.
2. The claimant appeared in person but was accompanied and assisted by his Advocacy Support Worker, Ms Karen Strang. The respondent was represented by Mr McHugh of Counsel.
3. The parties had agreed a joint bundle of documents. The claimant gave evidence on his own behalf. Four witnesses gave evidence on behalf of the respondent: Ms Young, Mr Usman, Mr Wallace and Mr Spence.
4. At a case management preliminary hearing on 3 October 2023 a number of adjustments were agreed to be put in place at the final hearing, namely:
 - a. The claimant would remain at his seat at the long table to give evidence and would not require to move to the witness table;
 - b. The claimant would give his evidence in chief by way of an oral statement, referring to the documents provided in the joint bundle of documents. If clarification were required, the Employment Judge

would ask him to provide it, but otherwise endeavour to allow the claimant to give his evidence with as few interruptions as possible;

c. Each of the other witnesses will give their evidence from the witness table;

5 d. The claimant may ask for a break if he feels anxious or otherwise in need of time out of the hearing, by raising his hand or asking the Employment Judge for a break, and a break will be granted for that reason;

10 e. The claimant will be accompanied throughout by his Advocacy Support Worker, Ms Strang;

f. If the claimant chooses to challenge the evidence of the respondent's witnesses in the course of submissions rather than in cross examination (which would increase his anxiety and exacerbate his conditions), he may do so, without the respondent suggesting that he has failed to put his case to the respondent's witnesses.

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5. All of these adjustments were put in place as agreed at the hearing, save that the claimant had prepared questions for each of the respondent's witnesses and was able to put his case to each of those witnesses in cross examination.

20 **Issues to be determined**

6. The parties had agreed a list of the issues to be determined by the Tribunal and they are set out below. The issue of disability was no longer in dispute, having been conceded by the respondent on 19 September 2023.

Jurisdiction – s.123 Equality Act 2010

25 7. Was the claim form submitted more than 3 months after some of the conduct complained of?

8. If so, did that conduct form part of a chain of continuous conduct which ended within 3 months of the claim form being submitted?

9. If not, would it be just and equitable for the Tribunal to hear that part of the claim which relates to the conduct which occurred more than 3 months before the claim was submitted?

Direct disability discrimination – s.13 Equality Act 2010

5 10. The comparator relied upon is Mr Patrick Laughland, the claimant's trade union representative from USDAW.

10 11. Was the claimant treated less favourably than the comparator was or would have been? The claimant says the less favourable treatment was that Mr Spence negotiated with Mr Laughland and agreed a date to attend the claimant's formal long term absence meeting (a date which favoured Patrick Laughland and Derek Spence) but Mr Spence had prevented the claimant from negotiating a date for the claimant himself to allow his advocacy worker (Ms Strang) to attend both the formal long term absence meeting and the
15 previous wellness meeting.

12. If so, was the reason for the treatment either:

- a. The claimant's disability, or
- b. The perception that the claimant was a disabled person?

20 *Failure to make reasonable adjustments – s.20 Equality Act 2010*

13. Would an auxiliary aid have prevented the claimant being placed at a substantial disadvantage in comparison with employees who were not disabled? The auxiliary aid relied on is the claimant's advocacy worker's presence at meetings with him.
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14. If so, did the respondent take reasonable steps to prevent the claimant being placed at the disadvantage or to provide the auxiliary aid?

30 15. Did the respondent take reasonable steps such as:

- a. Trying to arrange meetings at times and dates that his advocacy worker could attend?
- b. Allowing his advocacy worker to attend his meeting(s).

Harassment related to disability – s.26 Equality Act 2010

- 5 16. Has there been any unwanted conduct related to disability? The allegations are as follows:
- a. Ross Wallace suspended the claimant on 5 March 2021 and accused him of intimidating other members of staff;
 - b. Ross Wallace refused to pay for the claimant's suspension and told 10 him to return to work on 30 September 2021;
 - c. On 19 April 2021, Ross Wallace included information in relation to the claimant's suspension, investigation, outstanding appeal and a separate incident of bullying in the OH referral, but did not include information on his disabilities and instead falsely claimed that the 15 claimant was reluctant to share medical conditions;
 - d. Ross Wallace stated in a wellness meeting on 13 September 2021 that the claimant's adjustment passport was no longer workable and recommended another store;
 - e. Ross Wallace claiming a deterioration in the claimant's behaviour and 20 attacking the sustainability of the claimant's adjustment passport.
17. Did that conduct have the purpose or effect of:
- a. Violating the claimant's dignity; or
 - b. Creating an intimidating, hostile, degrading, humiliating or offensive 25 environment for the claimant?

Victimisation – s.27 Equality Act 2010

18. Has the claimant done a 'protected act?' The protected act relied upon is that the respondent had agreed with the claimant, on the date of 24/6/20, the terms of an agreed passport relating to reasonable adjustments being put in 30 place for him.

19. If so, were they treated less favourably as a result? The less favourable treatment relied on is that, as a result of the protected act, the claimant was investigated on the date of 12/11/20 for his behaviour and as an outcome the claimant's passport was disclosed to all members of staff in December 2020.

Remedy

20. Should any amount be awarded for injury to feelings?

21. What financial compensation would be appropriate in all of the circumstances?

Findings in Fact

22. The Tribunal makes the following findings in fact.

23. The claimant, Mr Maxwell, commenced employment with the respondent, Tesco Stores Ltd ('Tesco'), on 1 August 2013 as a Customer Assistant at the East Calder Express store.

24. Mr Maxwell is a disabled person within the meaning of s.6 Equality Act 2010 by reason of Autistic Spectrum Disorder, Dyspraxia and Anxiety.

25. Mr Maxwell's employment with Tesco was without incident until 2018 when difficulties with a colleague at the East Calder store arose and the claimant made complaints of bullying. The claimant's complaint against his colleague was not upheld, but it was agreed that an adjustment passport should be completed in order to support the claimant.

26. On 27 November 2018 the claimant's then line manager, Mr Boyle, completed an adjustment passport that set out the impact on Mr Maxwell of his disabilities at work. The passport noted that, as a result of Mr Maxwell's dyspraxia, he has to work twice as hard as an 'average colleague', that a build up of changes can lead him to feel stressed, that there is a need to take

one thing or one step at a time, that the level of difficulty of roles needs to be a consideration, that he needs to know why Tesco are doing things and if there is a change of task this should be explained, that his manager should let him know if he is talking too loud, that it is important to recognise when Mr Maxwell is not coming across in the correct way with body language and the way he is talking, and that he is able to manage his role in a much better way when he sticks to a routine.

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27. The adjustment passport set out that, on a good day, Mr Maxwell believes that his disability has the following impact on him at work:

- a. Quiet
- b. Getting on with my work
- c. Leave me to get on with my job as this is a sign of me working well

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28. It also set out that when things are not so good, the following symptoms are indications that Mr Maxwell is not well:

- a. Tone of my voice
- b. I am probably complaining about something. This would be a good indicator of how I am feeling as on a good day I wouldn't let it bother me
- c. Inside feeling a bit stressed but maybe not tell you
- d. When I debate or argue about difference of opinion this is another indication that I may be having a bad day

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29. It then set out the following adjustments that had been agreed between Mr Maxwell and his manager:

- a. If find self in a difficult situation then ensure call on the 'duty manager' at the time to deal with
- b. Do not take delivery on own – always 2 colleagues
- c. On Alan return (Friday 7/12/18) review the number of hours that Robin works and reduce if a better plan
- d. If Robin feeling stressed he will ask to do a different job

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- e. Requested conflict training from Robin 27/11/18. Alan to pick up on his return

5 30. On 24 June 2020 a new adjustment passport was prepared by Mr Maxwell's then line manager, Mr Ross Collins. That passport noted asthma, dyspraxia, affect on fine motor skills, anxiety and autistic spectrum disorder (ASD) and noted that clear instructions are needed. The passport set out that the following adjustments had been agreed:

- a. Team leader/ manager to give instructions
- 10 b. Robin to speak to shift leaders when stresses arise
- c. Robin to ask for small breaks when he feels necessary
- d. Not to be left alone to do delivery
- e. Robin to have one task at a time, or at most checkouts and cigarettes

15 31. In November 2020 an issue arose between Mr Maxwell and one of his colleagues in the East Calder store, the same colleague against whom Mr Maxwell had previously raised a complaint. The respondent called Mr Maxwell to an investigation meeting with another Store Manager, Jane Young, to take place on 10 November 2020, the purpose of the hearing being
20 to discuss allegations of 'Reacting inappropriately to communication left by your colleague Shona Morrice in the Bakery regarding labelling rolls'.

32. The meeting was rescheduled to 12 November 2020 and Mr Maxwell attended and was accompanied by his mother and a union representative.
25 Mr Collins attended as a note taker.

33. Ms Young concluded her investigations and on 22 November 2020 informed Mr Maxwell that she had found that there was no evidence to suggest that he had behaved inappropriately. There was an adjustment in place regarding
30 communication and on this occasion the adjustment was not kept to. Ms Young found that this was because the adjustment had not been fully communicated store wide further than the Shift Leaders. It was agreed that Mr Collins, in his role as Store Manager, should communicate directly with

every colleague in store and advise them of the adjustment that was in place for communicating with Mr Maxwell and that it must also be made clear to the Store Team that it is reasonable and entirely acceptable for colleagues to communicate directly between themselves in order to ensure the running of a smooth operation. The adjustment mentioned was in place to support Mr Maxwell rather than exclude this type of communication between other colleagues.

34. Mr Collins then produced a document headed 'Communication Adjustment' which stated '*Dear Colleagues, I am writing to inform you of an adjustment passport that is in place for one of your colleagues in order to support them. I would like to explain this to you to help us all work better as a team within the store. I have agreed an adjustment into communication processes in regards to your colleague Robin Maxwell. The adjustment that is in place is that all instruction whether direct or indirect to Robin Maxwell must come from a Shift Leader or Manager. I would also like to take this opportunity to make clear that it is reasonable and entirely acceptable for colleagues to communicate directly between themselves in order to ensure the running of a smooth operation. The adjustment mentioned is in place to support Robin rather than exclude this type of communication between other colleagues. If you have any questions please do not hesitate to ask me. Please read and sign to confirm that you have received and understand this.*' All of the claimant's colleagues were provided with this document and required to sign and date it to confirm that they had read it.

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35. Mr Maxwell was not aware at that time that this document had been circulated amongst his colleagues, nor was he aware that they were to be informed that he had an adjustment passport in place.

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36. In around January 2021 Mr Wallace took on the role of Store Manager at the East Calder store. He was simultaneously looking after a total of four stores. Mr Wallace therefore became Mr Maxwell's line manager. Mr Wallace had no prior knowledge of Mr Maxwell. Mr Wallace became aware from Mr Maxwell's

file that he had an adjustment passport in place, but he did not discuss his adjustments with him on taking over his line management.

5 37. On 5 March 2021 there was an incident in the East Calder store. A colleague alleged that Mr Maxwell had behaved inappropriately. Mr Maxwell went to the canteen to telephone his mother and, as he was upset, was speaking with a raised voice. This came to the attention of Mr Wallace, the Store Manager, who asked to speak to the claimant. The claimant requested that a witness be present for that conversation but Mr Wallace did not agree that was
10 necessary. This upset Mr Maxwell who informed Mr Wallace that he was worried for his personal safety, that he felt Mr Wallace was bullying him, and that he was going to call the police because he believed he was being accused of intimidating other members of staff which he believed to be a criminal offence and wanted the police to attend to look at the CCTV in the
15 store. Mr Maxwell subsequently called the emergency services. Whilst speaking with them Mr Maxwell explained that he was having a panic attack. The call handler therefore decided to send an ambulance. Mr Maxwell then left the store. By the time the ambulance arrived Mr Maxwell was no longer on the premises.

20 38. Mr Wallace tried to contact Mr Maxwell by telephone later that day but was unable to do so. He then decided to suspend Mr Maxwell from work and wrote to him on 5 March 2021 to explain that he was suspended pending the outcome of an investigation into the following allegation "*On the 05/03/21 at approximately 10am your behaviour was unacceptable by raising your voice whilst on the phone which had a huge impact on your colleagues who were in the vicinity and also impacted our customers as your raised voice could also be heard on the shop floor. These comments were of an accusatory
25 manner and could be harmful to the business and the reputation of the individual they were directed towards. The manner in which you behaved during this heated episode prevented colleagues from approaching you to offer support to diffuse the situation.*"

39. Mr Maxwell subsequently advised Mr Wallace that he was unwell due to work related stress and he was therefore moved from suspension to sickness absence with effect from 12 March 2021.

5 40. Mr Wallace then made a referral to Occupational Health ('OH'). The referral made reference to the fact that Mr Maxwell had an adjustment passport on file, and the adjustments that had been agreed, but made no reference to Mr Maxwell's disabilities. The referral stated that Mr Wallace wanted to understand whether Mr Maxwell was fit to take part in the investigation. The
10 referral also stated "*I am seeing deterioration in both Robin's performance and his behaviour, how can I support Robin in an ever changing work environment where there are less colleagues than previous and the expectations of colleagues being multi skilled in all areas of the store working collaboratively together... Robin has previous adjustment passports which
15 are no longer sustainable, how can I work with Robin to help move forward and update these to fit both Robin and the business...In a store with fewer colleagues it is difficult to not have certain colleagues working together and from a business point of view this will have to happen, how do I help Robin overcome this with the colleagues he choses not to engage with.*"

20 41. The OH report dated 14 June 2021 noted Mr Maxwell's Autism Spectrum Disorder, Dyspraxia and Asthma. It stated that the claimant was not currently fit for work and that an investigation meeting would not be appropriate until Mr Maxwell was fit to return to work.

25 42. By letter dated 6 September 2021 Mr Maxwell was invited to a wellness meeting with Mr Wallace. That meeting was held with Mr Maxwell and his Mum on 13 September 2021. At that meeting they discussed the fact that Mr Maxwell would shortly be fit to return to work and discussed whether he would
30 then be re-suspended pending the investigation. During this meeting Mr Wallace also made reference to the fact that Mr Maxwell's adjustment passport was no longer workable at the East Calder store and suggested that it may be better for Mr Maxwell to transfer to a different store. In a further call on 28 September 2021, and confirmed in a letter dated 6 October 2021, Mr

Wallace confirmed to Mr Maxwell that he would not be re-suspended now that he was fit to return to work. Mr Maxwell was informed that he could return to work with an adjustment plan, or return to work in a different store with an adjustment plan, or he could use holiday entitlement to extend his absence or take some unpaid leave. Mr Maxwell did not in fact return to work on 19 September 2021 and on 5 October 2021 Mr Maxwell advised the respondent that he remained unfit for work.

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43. Mr Maxwell then remained on long term sickness absence as a result of a bereavement and other difficulties with his health. By a letter dated 7 January 2023 the respondent invited the claimant to a wellness meeting on Saturday 21 January 2023 with another Store Manager, Derek Spence. The claimant had been expecting such meetings to be carried out by the Store Manager and his then line manager, Lynn Gilchrist, but she could not conduct that meeting as she was on holiday and the responsibility had been passed to Mr Spence. Mr Spence had no prior knowledge of Mr Maxwell. Mr Maxwell was unable to attend that meeting as he was unable to make contact with his Advocacy Support Worker, Ms Strang, to arrange for her to accompany him and he telephoned Mr Spence to inform him of this on 19 January 2023.

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44. By letter dated 23 January 2023 Mr Maxwell was invited to a rescheduled wellness meeting on Saturday 4 February 2023. Mr Maxwell was unable to attend this meeting as Ms Strang was unable to attend meetings on Saturdays as she only worked Monday to Friday. Mr Maxwell telephoned Mr Spence to inform him of this on 3 February 2023. Mr Spence informed Mr Maxwell that it was in his best interests to attend the meeting and that if he didn't attend then the meeting would be held in his absence.

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45. Mr Spence held the meeting on 4 February 2023. Mr Maxwell did not attend as he did not feel able to attend the meeting without his Advocacy Worker.

46. Mr Spence then decided to progress matters to the next stage of the absence process and by letter dated 6 February 2023 Mr Maxwell was invited to a first formal long term absence meeting on 13 February 2023. Mr Maxwell

contacted his union representative, Mr Patrick Laughland, who made contact with Mr Spence and agreed that this meeting would be rescheduled and changed back to a wellness meeting.

5 47. By letter dated 17 February 2023 Mr Maxwell was invited to a further wellness meeting to take place on 24 February 2023. On 24 February 2023 Mr Maxwell telephoned Mr Spence to explain that he had not received the invitation letter and was unable to attend the meeting as Ms Strang was not available on this day or the following Friday. On the same day Mr Spence sent Mr Maxwell
10 another invitation to a first formal long term absence meeting to take place on 2 March 2023. Ms Strang was available to attend that meeting, but later that day Mr Spence sent a second letter rescheduling the meeting to the following day, 3 March 2023. As had previously been notified to the respondent by Mr Maxwell, Ms Strang was not available to attend that meeting and therefore
15 Mr Maxwell did not attend the meeting. Mr Maxwell telephoned Mr Spence on 2 March to explain why he would not be attending as his Advocacy Support Worker was not available for that date.

20 48. Mr Maxwell was then sent a letter headed 'Re: Refusal to attend long term absence meeting' and offering two dates for a second formal absence meeting.

25 49. On 3 March 2023 Mr Maxwell raised a grievance alleging that the respondent had failed to make reasonable adjustments by not negotiating a reasonable date for his Advocacy Support Worker, Ms Strang, to attend and support him for a wellness meeting. The grievance letter explained that the continual switching between informal and formal meetings had confused Mr Maxwell and caused him a lot of anxiety.

30 50. The claimant presented his claim to the Employment Tribunal on 31 May 2023.

51. By letter dated 14 June 2023 Mr Maxwell resigned from his employment giving 4 weeks notice. His employment with the respondent terminated on 12 July 2023.

5 52. Mr Usman, a Store Manager, was appointed to investigate Mr Maxwell's grievance. By letter dated 3 July 2023 Mr Usman informed Mr Maxwell that his grievance was not upheld.

Relevant Law

Direct discrimination

10 53. s.13(1) Equality Act 2010 ("EA") provides:

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

54. S.23 EA provides:

15 *(1) On a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.*

55. In order to claim direct discrimination under s.13 the claimant must have been treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant. The one factor that must
20 be left out of account is the protected characteristic itself. Therefore, the comparator in the context of a direct disability discrimination claim cannot be disabled themselves. This was made clear by Lord Scott in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 when he observed: '[T]he comparator required for the purpose of the statutory
25 definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class.'

56. In *Igen Ltd (formerly Leeds Careers Guidance) and others v Wong and other cases* [2005] ICR 931 the Court of Appeal established that the correct

5 approach for a Tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the Tribunal could infer that discrimination has taken place. Only if such facts have been made out to the Tribunal's satisfaction (i.e., on the balance of probabilities) is the second stage engaged, whereby the burden shifts to the respondent to prove, again on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, 10 EAT.

Failure to make reasonable adjustments

57. S.20 EA provides:

- 15 (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.*
- 20 (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.*
- 25 (4) *The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a 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.*
- 30 (5) *The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

58. Section 21 EA provides:

(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.*

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

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Harassment

59. s.26 Equality Act 2010 provides:

(1) *A person (A) harasses another (B) if-*

15 (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....*

20 (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.*

25 60. Whether conduct is 'unwanted' should largely be assessed subjectively, from the employee's point of view. The EAT in *Thomas Sanderson Blinds Ltd v English EAT 0316/10* pointed out that 'unwanted conduct' means conduct that is unwanted by the employee.

61. In *Richmond Pharmacology v Dhaliwal* 2009 ICR 724, Underhill J (President) said ‘Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended.’ In *Betsi Cadwaladr University Health Board v Hughes and ors* EAT 0179/13 the EAT observed that the word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence. The EAT noted that, whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.

62. In *Land Registry v Grant* [2011] ICR 1390 Elias LJ stated that Tribunals must not cheapen the significance of the words of the statute in respect of violating a claimant’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

63. In order to constitute unlawful harassment under s.26(1) Equality Act, the unwanted and offensive conduct must be ‘related to a relevant protected characteristic’. However offensive the conduct, it will not constitute harassment unless it is so related, and a tribunal that fails to engage with this point will err – see *London Borough of Haringey v O’Brien* EAT 0004/16.

Victimisation

64. S.27 EA provides:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

- (a) B does a protected act, or
- (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;
- 5 (d) Making an allegation (whether or not express) that A or another person has contravened this Act.

Time limits

65. S. 123 EA provides:

- 10 (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of-
 - (a) The period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) Such other period as the employment tribunal thinks just and equitable....
- 15 (3) For the purposes of this section-
 - (a) Conduct extending over a period is to be treated as done at the end of the period;
 - (b) Failure to do something is to be treated as occurring when the person in question decided on it.

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66. In considering the question of whether there is conduct extending over a period, the focus should be on whether there was an ongoing situation or continuing state of affairs. The relevant question is whether the conduct is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed – see *Commissioner of Police of the Metropolis v Hendricks (CA) [2003] ICR 530*.

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67. The EAT set out a useful summary of the principles governing the exercise of the 'just and equitable' discretion in *Miller and ors v Ministry of Justice and ors and another case EAT 0003/15*. The discretion to extend time is a wide one. Time limits are to be observed strictly. The exercise of the discretion is

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the exception rather than the rule. What factors are relevant to the exercise of the discretion, and how they should be balanced, are a matter for the Tribunal. The prejudice that a respondent will suffer from facing a claim which would otherwise be time-barred is customarily relevant in such cases. The Tribunal may find the checklist of factors in s.33 of the Limitation Act 1980 helpful but this is not a requirement and a tribunal will only err in law if it omits something significant. Two factors which are almost always relevant when considering the exercise of discretion are the length of, and reasons for, the delay, and whether the delay has prejudiced the respondent.

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68. In *Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 238* the EAT held that consideration of exercising the just and equitable discretion involves a multi-factorial approach, with no single factor being determinative, and included consideration of the length of and reasons for the delay, the balance of prejudice between the parties in granting or refusing the extension of time and the potential merits of the substantial claim and that the Tribunal had erred in deciding not to extend time once they had rejected the claimant's explanation without considering the potential merit of the substantive claim and the balance of prejudice for the parties.

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20 **Claimant's submissions**

69. Mr Maxwell provided helpful written submissions that the Tribunal considered carefully and that are not repeated here.

Respondent's submissions

70. Mr McHugh provided helpful written submissions that the Tribunal considered carefully and that are not repeated here.

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Discussion and decision

Direct discrimination

71. The claimant alleged that he had been treated less favourably than his union representative, Mr Patrick Laughland, when Mr Spence negotiated with Mr Laughland a date for Mr Maxwell to attend the formal long term absence at some point between 6 and 17 February 2023. Taking into account the period of ACAS conciliation, this claim was brought within the required time limits.

72. The Tribunal concluded that Mr Laughland was not in the same position in all material respects as Mr Maxwell and was therefore not an appropriate comparator. Mr Maxwell was absent from work on sick leave and required to attend wellness meetings to review his absence. Mr Laughland was Mr Maxwell's union representative. Mr Laughland was not himself subject to the requirement to attend a wellness meeting and therefore not in the same or similar circumstances to Mr Maxwell.

73. Mr Laughland contacted Mr Spence on behalf of Mr Maxwell in his capacity as union representative and requested that the first formal long term absence meeting be changed back to a wellness meeting and discussed with Mr Spence an appropriate date for that meeting. Mr Spence acceded to that request. The Tribunal do not consider this was less favourable treatment of the claimant by Mr Spence. Mr Spence believed that Mr Laughland was seeking to rearrange the meeting on behalf of Mr Maxwell to a date that was convenient for Mr Maxwell, his union representative and his Advocacy Support Worker.

74. The Tribunal also went on to consider whether, if this had amounted to less favourable treatment, it was because of the claimant's disability. The Tribunal were satisfied that any difference in treatment between Mr Maxwell and Mr Spence in the rearranging of meetings was not because of Mr Maxwell's disability. The Tribunal accepted Mr Spence's evidence that Mr Laughland had contacted him directly to explain that he would need to be present at any future meetings to represent Mr Maxwell, that Mr Laughland proposed a date

for the next meeting and suggested that this be reverted back to a wellness meeting. Mr Spence agreed to this proposal. He had not received such a proposal from Mr Maxwell. There was no evidence to suggest that any difference in treatment was because of Mr Maxwell's disability. The claim for direct disability discrimination does not succeed and is dismissed.

Failure to make reasonable adjustments

75. The claim for reasonable adjustments related to the period between January and March 2023 when arrangements were being made for the claimant to attend meetings relating to his absence. The last such meeting complained of was scheduled for 3 March 2023. Taking into account the period of ACAS conciliation, this claim was brought within the required time limits.

76. The Tribunal first considered whether the auxiliary aid, namely the provision of an Advocacy Support Worker, prevented Mr Maxwell from being placed at a substantial disadvantage in comparison with employees who were not disabled.

77. Mr Maxwell required the attendance of his Advocacy Worker, Ms Strang, because she understood his disabilities and would be able to assist him in relation to those disabilities. As a result he would be calmed by her presence and able to conduct the meeting in a manner he would not be able to in her absence. This would not apply to his union representative who, although he could assist Mr Maxwell with representation, would not be a suitable alternative to an Advocacy Support Worker. Their roles were different. The Tribunal found that Mr Maxwell would be at a substantial disadvantage in comparison to other employees who were not disabled in having to attend wellness and formal long term absence meetings without the assistance of his Advocacy Worker in that, because of his disabilities, he would find it more difficult to deal with the stress of such meetings and to explain himself and the impact of his disabilities without her assistance. The Tribunal concluded that the attendance of Ms Strang would prevent him from being placed at that disadvantage.

78. Did the respondent take reasonable steps to prevent Mr Maxwell being placed at the disadvantage or to provide the auxiliary aid? The Tribunal were satisfied that the respondent took some steps to allow Ms Strang to attend the meetings with Mr Maxwell as some meetings were rearranged when Mr Maxwell explained that Ms Strang was not available to attend. However, the Tribunal concluded that the respondent had failed to take reasonable steps to enable Ms Strang to attend the meeting that eventually took place on 3 March 2023. The meeting had originally been scheduled for 2 March 2023, a date that Ms Strang was able to attend, but was then changed to Friday 3 March 2023, a date that Mr Maxwell had already informed Mr Spence Ms Strang could not make. Despite reminding Mr Spence of this and asking for the meeting to be rearranged, Mr Spence proceeded with that meeting in Mr Maxwell's absence and then progressed matters to the next stage in scheduling a formal absence meeting.

79. The Tribunal notes that Mr Usman provided feedback in his grievance conclusions that Mr Spence could have contacted Ms Strang directly to organise suitable meeting dates and times and the Tribunal concurs with this observation. Instead of taking a proactive approach to ensuring that meetings were scheduled for dates and times that both Mr Maxwell and his Advocacy Support Worker could attend, it was perceived by Mr Spence that Mr Maxwell was trying to evade the situation. The Tribunal took the view that this was in part because Mr Spence did not know Mr Maxwell and did not have a clear understanding of the nature of his disabilities and how they impacted Mr Maxwell with regard to the arranging and rearranging of meetings. It would have been preferable for those wellness and absence meetings to have been conducted by a manager who knew Mr Maxwell and understood his disabilities. The Tribunal concluded that Mr Maxwell was not seeking to evade meeting with Mr Spence, but was simply endeavouring to ensure that Ms Strang could accompany him to those meetings. A more proactive and sympathetic approach by Mr Spence to the timetabling of those meetings in

order to accommodate the attendance of Ms Strang would have avoided this difficulty.

5 80. On behalf of the respondent Mr McHugh submitted that at no stage had Mr Maxwell required that the respondent provide him with an Advocacy Worker, that at all material times he had his own Advocacy Worker and therefore did not require provision of the same by the respondent. The Tribunal concluded that the re-scheduling of the meeting to 3 March 2023, a date the respondent knew Ms Strang could not attend, thereby preventing her from attending the meeting with Mr Maxwell, is sufficient to amount to the respondent failing to provide the claimant with an Advocacy Worker.

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81. The Tribunal therefore upheld the claim for a failure to make reasonable adjustments in respect of the meeting of 3 March 2023.

15 **Harassment**

82. The allegations of harassment are as follows:

- a. Ross Wallace suspended the claimant on 5 March 2021 and accused him of intimidating other members of staff;
 - b. Ross Wallace refused to pay for the claimant's suspension and told him to return to work on 30 September 2021;
 - c. On 19 April 2021, Ross Wallace included information in relation to the claimant's suspension, investigation, outstanding appeal and a separate incident of bullying in the OH referral, but did not include information on his disabilities and instead falsely claimed that the claimant was reluctant to share medical conditions;
 - d. Ross Wallace stated in a wellness meeting on 13 September 2021 that the claimant's adjustment passport was no longer workable and recommended another store;
 - e. Ross Wallace claiming a deterioration in the claimant's behaviour and attacking the sustainability of the claimant's adjustment passport.
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83. The last act relied upon for the harassment claim is alleged to have taken place on 30 September 2021. The claimant's ET1 was received by the Tribunal on 31 May 2023 and these claims are therefore potentially brought some 17 months outside of the required time limit.

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84. The Tribunal therefore first had to consider whether the allegations of harassment formed part of a course of conduct extending over a period that brought the claims within the relevant time period.

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85. The Tribunal concluded that Mr Maxwell's complaints about Mr Wallace during the period of March to September 2021 did not form part of a course of conduct that continued until 2023. Although Mr Maxwell has brought claims about matters taking place in 2023 that are in time, they were different complaints against other managers, and the Tribunal consider that these were not continuing acts, but rather were a succession of isolated acts.

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86. The harassment claims have therefore been brought significantly outside of the relevant time limits set out in s.123 EA. The Tribunal went on to consider whether it was just and equitable to extend time. Mr Maxwell stated under cross examination that he had not brought a claim following the events of November 2020 because he had no knowledge of the law, he was younger then, he had not met his Advocacy Support Worker and his union representative, Mr Laughland, and that his understanding had got better over time. He had no intention of bringing a claim at that time. In relation to bringing a claim following the events of September 2021 he said that was because he was off sick with work related stress and he had no knowledge of what claims he could bring forward. He was looking to resolve or find a solution to the issue and to get back to work. He did not know that it was possible to bring a Tribunal claim. Mr Maxwell also accepted that he was receiving advice from the Union at that time who advised him to follow the internal process.

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87. On behalf of the respondent Mr McHugh submitted that the claimant had the benefit of union representation and assistance as far back as November 2020 and that by October 2021 he had additional support from his Advocacy

Support Worker. He submitted that there had been forensic prejudice caused by the significant delay in bringing the claims. Potentially relevant witnesses were no longer available, some documents relevant to the victimisation claim were no longer available due to the passage of time and, in respect of the harassment claims, Mr Wallace's evidence was materially affected in that he could not recall some of the contents of the conversations due to the passage of time.

88. The Tribunal considered the merits of the harassment claims before reaching its conclusions on whether it was just and equitable to extend time and its conclusions are set out below. The Tribunal considered that the delay in bringing the claim was lengthy, some 17 months, and that this did impact on Mr Wallace's ability to properly recollect events and to respond fully to the claims. The reason given for the delay in bringing these claims was that Mr Maxwell was unaware of his rights to bring a Tribunal claim at the time these events occurred, but the Tribunal noted that he had union representation and also had assistance from Ms Strang from October 2021 such that, had he considered that he had suffered harassment related to his disability at that time, he would have been in a position to obtain the knowledge of the appropriate steps to bring a claim within the required time limit. The Tribunal reminds itself that there are strict time limits for bringing discrimination claims before the Tribunal with good reason. It considered the balance of prejudice between the parties and concluded that, particularly as a result of the length of the delay, the prejudice to the respondent in being able to fully respond to the claims as a result of the inability to clearly recollect incidents that had taken place over 2 years ago outweighed the prejudice to the claimant in dismissing the claims. The Tribunal therefore concluded that the harassment claims were brought outside of the relevant time limits, that it was not just and equitable to extend time for those claims, and that the Tribunal did not have jurisdiction to consider them. Those claims are therefore dismissed.

89. The Tribunal reached the following conclusions on the merits of the harassment claims.

Unwanted conduct

90. The Tribunal concluded that Mr Wallace suspending Mr Maxwell and accusing him of intimidating members of staff was unwanted conduct.

5 91. The Tribunal were not satisfied that there was any 'refusal to pay for the claimant's suspension.' The claimant was fit to return to work from 19 September 2021. He had not been suspended since early March 2021 as, shortly after he had been suspended, he had been signed off sick. The respondent did not consider that it was necessary for Mr Maxwell to continue
10 to be suspended whilst they investigated the events of 5 March 2021 and in those circumstances it was appropriate for Mr Maxwell to return to work whilst the investigation proceeded. The initial suspension had been with the purpose of allowing time to diffuse the situation that had occurred in the workplace and this reason no longer applied some months later. As Mr
15 Maxwell expressed the view that he did not wish to return to work until the investigation had been concluded, Mr Wallace offered him alternatives to remain away from work. The Tribunal did not consider that the decision not to re-suspend Mr Maxwell amounted to unwanted conduct.

20 92. The Tribunal were satisfied that the failure of Mr Wallace to include information on Mr Maxwell's disabilities in the OH referral form, and the claim that he was reluctant to share his medical conditions, was unwanted conduct. The Tribunal was also satisfied that the comments of Mr Wallace about Mr
25 Maxwell's adjustment passport being no longer workable and the claims of deterioration in behaviour were also unwanted by Mr Maxwell.

Was it related to disability?

93. The Tribunal concluded that the claimant's suspension on 5 March 2021 and the allegation that he had intimidated other members of staff were because
30 of the events that had occurred in the East Calder store on that day and the complaints made by another member of staff. The Tribunal therefore

concluded that this unwanted conduct was not related to Mr Maxwell's disability.

5 94. The Tribunal had concluded that there had been no unwanted conduct in respect of a refusal to pay for Mr Maxwell's suspension and by telling him return to work, but even if the Tribunal were incorrect about this, it concluded that this would not have been conduct related to Mr Maxwell's disability. The Tribunal accepted Mr Wallace's evidence that the reason for the initial suspension was to allow Mr Maxwell to calm down and to diffuse the situation
10 in the workplace following the events of that day and, as at September 2021, this was no longer required. It was entirely proper in the circumstances for the respondent to lift the suspension after a period of time as it was no longer required.

15 95. In respect of the claim regarding the information included in the OH referral on 19 April 2021, the Tribunal were satisfied that the extent to which Mr Wallace did or did not provide sufficient information about Mr Maxwell's disabilities was not motivated by or related to his disabilities. Although the Tribunal accepts that the referral was not as clearly worded as it could have
20 been in respect of Mr Maxwell's disabilities, it accepted that Mr Wallace believed that the form provided sufficient information, in setting out the details of Mr Maxwell's adjustment passport, to provide adequate background for the OH provider to advise after speaking with Mr Maxwell. The unwanted conduct was not related to Mr Maxwell's disability.

25 96. The Tribunal were satisfied that Mr Wallace stating that Mr Maxwell's adjustment passport was no longer workable and recommending another store, as well as claiming a deterioration in Mr Maxwell's behaviour was related to Mr Maxwell's disability. The Tribunal concluded that Mr Wallace,
30 having taken over the management of the East Calder store, perceived that there were going to be difficulties accommodating the adjustments required for Mr Maxwell's disabilities where the respondent had reduced the number of staff for the store. This was compounded by the fact that Mr Wallace was looking after four stores at the time, and there had been a reduction in

5 headcount at the East Calder store. Mr Wallace believed that the reasonable adjustments required by Mr Maxwell were going to make it difficult for Mr Wallace in staffing that store, particularly in circumstances where he could not require Mr Maxwell to work with the colleague against whom he had previously complained. Instead of considering how to accommodate the adjustments Mr Maxwell required in light of the reduction in staff, Mr Wallace took the view that the adjustments were no longer workable and that it would be simpler to move Mr Wallace to another store. Mr Wallace had perceived a deterioration in Mr Maxwell's behaviour but it was clear from the evidence the Tribunal heard on this issue that this was, as with Mr Spence, the result of Mr Wallace as his line manager failing to take time to understand Mr Maxwell's disabilities and how they impacted on him in the workplace. This was plainly related to Mr Maxwell's disabilities and the reasonable adjustments required for them.

15 *Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? If not, did it have that effect? In determining this question the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

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97. The Tribunal went on to consider whether the unwanted conduct related to Mr Maxwell's disability, namely Mr Wallace stating that Mr Maxwell's adjustment was no longer workable and recommending another store, and claiming a deterioration in Mr Maxwell's behaviour and attacking the sustainability of his adjustment passport, had the purpose or effect of violating Mr Maxwell's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

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98. The Tribunal concluded that the Mr Wallace's unwanted conduct did not have that purpose. Mr Wallace was communicating what he believed to be the difficulties he was going to experience in accommodating Mr Maxwell's adjustments following the reduction in staff at the store. The Tribunal concluded that Mr Wallace did not give any thought to how Mr Maxwell would

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feel about this, he was only motivated by the challenges this presented to him as a manager of the store. However, the Tribunal did conclude that Mr Wallace's unwanted conduct in this regard did have the effect of creating a degrading and humiliating environment for Mr Maxwell. Mr Maxwell had an adjustment passport in place that had worked very effectively when he was line managed by individuals who had taken the time to understand the impact of his disabilities upon him in the workplace. The Tribunal concluded that it was understandably degrading and humiliating for Mr Maxwell to be informed that the adjustments that had worked effectively for a number of years were no longer workable. It was degrading and humiliating for Mr Maxwell to read that there had been a deterioration in his behaviour in circumstances where there had been no deterioration but rather a misunderstanding by Mr Wallace of the impact of his disabilities upon him in the workplace.

Victimisation

99. The victimisation claim related to events occurring in November and December 2020. As the claim was not issued until 31 May 2023 this claim was brought significantly outside of the relevant time limits. For the same reasons as set out above the Tribunal concluded that this claim did not form part of a continuing act with those claims that were brought within the time limit, nor would it be just and equitable to extend time. The Tribunal therefore had no jurisdiction to hear this claim and the claim is therefore dismissed. The Tribunal did consider the merits of this claim before reaching its conclusions on whether to extend time and its findings on the merits of the claim are as follows.

100. Mr Maxwell relied on a protected act of agreeing the terms of a reasonable adjustments passport on 24 June 2020 and alleged that he had been treated less favourably as a result of agreeing that passport in that he was investigated on 12 November 2020 for his behaviour and, as an outcome, his passport was disclosed to his colleagues in December 2020.

101. The Tribunal concluded that the act of agreeing a reasonable adjustments passport with the respondent that set out adjustments in respect of Mr Maxwell's disability was a protected act within the meaning of s.27(2) EA in that it amounted to 'any other thing for the purposes of or in connection with this Act' as the EA imposes the duty on employers to make reasonable adjustments for disabled employees.
102. The Tribunal went on to consider whether Mr Maxwell had been treated less favourably as a result of that protected act in being investigated on 12 November 2020 and his adjustment passport being disclosed to all members of staff in the East Calder store in December 2020.
103. The Tribunal concluded that Mr Maxwell had not been subjected to less favourable treatment because of the protected act. He had been investigated in November 2020 because of an incident that had occurred within the store and a subsequent complaint by one of his colleagues. It was entirely proper for the respondent to carry out that investigation. The investigation was not carried out because of the protected act. Mr Maxwell accepted under cross examination that he was subject to an investigation because another member of staff had made a complaint.
104. The outcome of the investigation was a finding that Mr Maxwell had not behaved inappropriately, but that his colleagues within the store had been unaware of the adjustments in place with regard to communication and that this had contributed to the incident that had occurred. In order to prevent this from happening again, Ms Young recommended that Mr Maxwell's colleagues be informed of that adjustment, and Mr Maxwell was agreeable to that course of action.
105. However, the method of informing his colleagues had not been explained to Mr Maxwell and he had not appreciated that they would be informed that he had an adjustment passport in place. The Tribunal concluded that this had been communicated to Mr Maxwell's colleagues in rather a clumsy fashion with little thought having been given to the impact on Mr Maxwell. However,

the Tribunal concluded that it had been done in this manner, by issuing a letter to all colleagues who were then required to sign to say they had read it, with the intention only of ensuring that everyone understood the adjustment that was in place for communicating with Mr Maxwell in order to avoid a similar situation arising again. The method of the communication was unrelated to the fact that Mr Maxwell had done a protected act. Although the communication related to the existence of Mr Maxwell's adjustment passport, that was not the reason for it.

10 **Remedy**

106. The Tribunal upheld Mr Maxwell's claim for a failure to make reasonable adjustments in respect of the meeting of 3 March 2023. It therefore went on to consider the appropriate remedy for this claim.

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107. The Tribunal were satisfied that Mr Maxwell had not suffered any loss of earnings or other financial loss in respect of this claim. It is apparent from Mr Maxwell's schedule of loss that, for the period between 16 October 2021 and 30 April 2023, he was not in receipt of any earnings from the respondent as a result of his long term sickness absence. The failure to make reasonable adjustments in relation to this particular meeting had no consequences in respect of Mr Maxwell's earnings. He did not return to work from his sickness absence before resigning his employment and this meeting would not, for example, have facilitated an expedited return to work or similar, bringing about a loss of earnings.

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108. The Tribunal went on to consider whether it was appropriate to make an award for injury to feelings and, if so, in what sum. The Tribunal bears in mind that awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party. Any award should not be so low as to diminish respect for the policy of the discrimination legislation but should not be so excessive as to be regarded as untaxed riches. The Tribunal had in

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mind the value in everyday life and the need for public respect for the level of awards made.

5 109. The Tribunal considered the three bands of injury to feeling award set down by the Court of Appeal in *Vento v Chief Constable of West Yorkshire Police (No. 2) 2003 ICR 318* and formed the view that this was a case that fell clearly within the lower band for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The lower band for any claim presented on or after 6 April 2023 is between £1,100 and £11,200.

10 110. In assessing the appropriate award the Tribunal took account of the evidence before it with regard to the impact that this failure to make reasonable adjustments had on Mr Maxwell. In particular, during the subsequent meeting with Mr Spence on 30 March 2023, Mr Maxwell explained the stress it had placed him under, and also in his grievance letter dated 3 March 2023 he explained he had been caused distress impacting on his health due to being confused and feeling unnecessary pressure to attend a meeting when his Advocacy Support Worker was unavailable. Taking all of those matters into account the Tribunal assessed the injury to feelings award at £5,000.

20 **Conclusion**

25 111. The Tribunal express their gratitude to Mr Maxwell and Mr McHugh for the extremely clear and helpful manner in which they presented their respective cases and to Ms Strang for her helpful assistance during the course of the hearing.

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Employment Judge Shepherd

18 March 2024
Date of Judgment

Date sent to parties

19/03/2024