



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr J Gray

v

P & F Safepac Co. Limited

Heard at: Norwich

On: 19 to 23 February 2024

Before: Employment Judge M Warren

Members: Ms S Elizabeth and Miss H Edwards

Appearances:

For the Claimant: In person

For the Respondent: Miss McGrath, Litigation Consultant

JUDGMENT having been sent to the parties on 12 March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. Mr Gray is employed and has been employed by the Respondent as an Assistant Transport Manager since 1 February 2011. After Early Conciliation between 15 March and 26 April 2023, he issued these proceedings claiming disability discrimination on 1 May 2023.
2. As for the issues in this case, the Respondent accepts that Mr Gray was a disabled person by reason of having cancer, he was so disabled at all material times and that it had knowledge of such disability.
3. The liability issues were discussed at the Preliminary Hearing which was before Employment Judge R Wood on 14 November 2023. I established at the outset of this hearing that during the Employment Judge Wood Preliminary Hearing the case was discussed in detail, the issues were discussed in detail and it was decided that Mr Gray's case was not one of a failure to make reasonable adjustments. That is something with which Mr Gray expressly agreed.
4. An Agreed List of Issues was drawn up as a result of those discussions

and set out in Employment Judge Wood's Hearing Summary. This is replicated below.

The List of Issues

1. The Complaints

- 1.1. Direct Discrimination (Disability) – s.13 of the Equality Act 2010 (“EqA 2010”)
- 1.2. Harassment (Disability) – s.26 of the EA 2010.

2. Disability

- 2.1. The Respondent accepts that the Claimant did have a disability of cancer as defined by section 6 of the Equality Act 2010 (“EA 2010”) at all material times.
- 2.2. The Respondent accepts that they had knowledge of the disability.

3. Direct Discrimination – s.13 of the EA 2010

1. Did the Respondent subject the Claimant to any of the following treatment?
 - 1.1. In February 2021 and March, the Respondent's Director, Mr Pearson made comments to all office staff about how many times the Claimant was going to the bathroom. He did so in a way intended to ridicule the claimant.
 - 1.2. On or around July / August/September 2021 Mr Pearson made comments about the Claimant having time off for treatments, questioning if he was actually going to the hospital and that it was a joke he had to go to so many appointments.
 - 1.3. In or around March 2021 Mr Pearson said to the Claimant that Mr Flynn had said to Mr Pearson “already paying him to be f***king sick.”
 - 1.4. In November 2021, the Claimant informed Mr Flynn & Mr Pearson that his surgery was due to take place in January 2022. Mr Pearson replied “can't you reschedule as I have a holiday booked.” and stated “If I cant have my f***king holiday I will go and work for Dixons or 3pl, otherwise my wife will divorce me”.
 - 1.5. On 14 January 2022, the Claimant informed Mr Pearson and Mr Flynn that owing to him needing to undergo liver re-section surgery. The Claimant needed to self-isolate and the Claimant asked whether he could work from home as he did during the Covid pandemic. Mr Pearson rejected the work from home request. However, during Mr Pearson's absence, the Claimant was giving help everyday to the temporary person covering his desk, Troy Ashley.
 - 1.6. The Claimant made several verbal requests to Mr Pearson, as to what financial support he could expect to receive. The Claimant did not

receive any response to his queries. It was only when Macmillan intervened at the beginning of February 2022 that Mr Flynn finally told the Claimant that he would be paid statutory sick pay (“SSP”).

- 1.6.1 The Claimant alleges he was treated differently than other members of staff who had been absent from work owing to sickness and who received full pay for two month, including Rachel Griggs, who were / had been absent from work owing to sickness and who received full pay for two months. The claimant had also been paid for 10 days of sickness (nothing to do with cancer). These were 10 elated days over a ten year period between 2011 and 2021.
- 1.7. In approximately March 2022, whilst recovering from an operation, staff members arranged a collection for the Claimant. However, when the directors were asked to contribute Mr Pearson sent an email to Mr Flynn saying “cannot wait to donate to such a worthy cause NOT”.
- 1.8. On 5 April 2022, Mr Flynn said in an email that he did not want the Claimant included in a company outing that was being organised. It was Mildenhall Football Club.
- 1.9. The Claimant requested in an email dated March 2021 and March 2022, for his holiday entitlement to be carried over in to the next year, but this was rejected.
 - 1.9.1 The Claimant alleges he was treated differently than other members of staff, namely, Patrick Hunt, who on April 2022 and 2023 had been allowed to carry over holiday to visit daughter in Australia. Further, Barry Hunt was allowed to do the same in relation to a holiday to Thailand. The Claimant says other employees were given similar allowances and that, prior to cancer, he too was allowed to carry over holiday for his wife’s birthday, most, if not every year of his employment, up to his cancer diagnosis.
- 1.10. On the Claimant’s return to work on 6 April 2022 and via email dated 5 April 2022 the Claimant was told by Mr Pearson that a return to work interview would have to be carried out before he started any work and he was told to wait in the office for approximately half an hour before being told no one could carry out this interview and no further instructions were given to him and as such no return to work interview took place, and no adjustments were offered to the Claimant.
- 1.11. On or around March 2022, during his absences, the Claimant was told by Mr Flynn that he had to ask for permission if he wanted to or needed to work any additional hours. Mr Flynn himself said “I trust you made these hours up” whilst having radiotherapy.
- 1.12. On or about 12th April 2022, the Respondent recruited John Hicks who was placed in a small, isolated office with the Claimant. This was detrimental to the Claimant’s health as John had recently

returned from sickness absence due to Covid and the Claimant still had 2 – 3 weeks of chemotherapy to go.

- 1.13. The Claimant had no equipment, no computer, and no work to do. In late April/May 2022, the Claimant asked Mr Pearson for work as he was bored and had nothing to do. The Claimant did not receive a reply.
- 1.14. Between May 2022 and July 2022, the Claimant asked Mr Pearson what his plans were for the Claimant as the other employee was doing almost all of the Claimant's job role. However, the Claimant received no reply.
- 1.15. Both the Claimant and John Hicks caught Covid. In late July 2022, the Claimant and John informed Mr Pearson that they were both unable to attend work and asked if they could carry out work from home. The Claimant did not receive a reply to his question about working from home. However, John was asked to continue working from home.
- 1.16. The Claimant's grievance was dated early / mid-November, but the hearing was delayed and was not heard until 27 February 2023.

2. Did the above amount to less favourable treatment?
3. If so, was the above treatment because of any of the following:
 - 3.1. The Claimant's disability of cancer.

4. Harassment – s.26 of the EA 2010.

1. Did the Respondent do the following things:
 - 1.1. See items referred to at 3.1.1 – 3.1.16 above.
2. If so, was that unwanted conduct?
3. Did it relate to disability?
4. 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?
5. If not, did it have that effect? 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.

2. Remedies

- 2.1 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
- 2.2 Is the Claimant entitled to any award for compensatory loss, if so, how much?

Evidence

5. This case was listed for hearing in person at the Norwich Employment Tribunal over six days. We have lost day six as I am not available to sit next Monday, so today, day five, is the final day.
6. We concluded all of the evidence and submissions at 11 o'clock yesterday, day four, so here we are giving Judgment on day five at just gone 12 o'clock.
7. We had before us witness statements from Mr Gray himself and for the Respondents, from his manager Mr Pearson and from the Managing Director and one of the Share Holders, Mr Flynn.
8. We also had before us a paginated and indexed Bundle of documents which ran to page 433. No additional documents were added to the Bundle during the course of the hearing. During an adjournment at the outset, we read the witness statements and read or looked at in our discretion, the documents referred to in the witness statements. We explained to the parties that we do not read the whole Bundle and we only consider those documents to which we have been taken in the evidence.

The Law

9. I have prepared a detailed explanation of the law which I am not going to read through now because it will take a lot of time and you probably, with the greatest of respect, will not follow.
10. By way of layman's explanation, to put in context what we are about to say, harassment is where an individual is subjected to unwanted conduct which is related in some way to a protected characteristic, in this case disability, which creates what we call a proscribed atmosphere; in other words an unpleasant atmosphere for that individual. Direct discrimination, which is the other head of claim, is where somebody is treated badly, in this case, because of their disability.
11. There follows my detailed explanation of the law.

Disability Discrimination

12. Disability is a protected characteristic pursuant to s.4 of the Equality Act 2010.
13. Section 39(2)(c) and (d) proscribes discrimination by an employer by either dismissing an employee or subjecting him to any other detriment.
14. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.
15. Section 40 prohibits harassment by an employer.

Direct Discrimination

16. Direct discrimination is defined at s.13 as follows:

(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...

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

17. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the Claimant, but not having his/her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The Claimant must show that he/she has been treated less favourably than that real or hypothetical comparator.

18. In a case of direct disability discrimination, the comparator would be a person in the same circumstances as the claimant, but who is not disabled as defined in the Equality Act 2010, see London Borough of Lewisham v Malcolm [2008] UKHL 43.

19. How does one determine whether any particular less favourable treatment was, “because of” a protected characteristic? There is no difference in meaning between the term, “because of” in section 13 and “on the grounds of”, under the pre-Equality Act legislation, (see Onu v Akwivu and Taiwo v Olaiqbe [2014] IRLR 448 at paragraph 40).

20. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572. Was the reason the protected characteristic, or was it some other reason? One has to consider the mental processes of the alleged discriminator. Was there a subconscious motivation? Should one draw inferences that the alleged discriminator, whether he or she knew it or not, acted as he or she did, because of the protected characteristic? - (see paragraphs 13 and 17).

21. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, “significant influence”:

“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is

obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”

22. The treatment of non-identical comparators in similar situations can also assist in constructing a picture of how a hypothetical comparator would have been treated: Chief Constable of West Yorkshire v Vento (No. 1) (EAT/52/00) (8 June 2000) at [7].

Harassment

23. Harassment is defined at s.26:

“(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;

...

24. We will refer to that henceforth as the proscribed environment. There are three factors to take into account:

24.1. The perception of the Claimant;

24.2. The other circumstances of the case, and

24.3. Whether it is reasonable for the conduct to have that effect.

25. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred. It also means that general bullying and harassment, in the colloquial sense, is not protected by the Equality Act; protection from such behaviour only arises if it is related in some way to the protected characteristic. See Warby v

Wunda Group Plc UAEAT/0434/11/CEA

26. HHJ Richardson observed in Hartley v Foreign and Commonwealth Office Services UAEAT/0033/15/LA at paragraph 23:

“The question posed by section 26(1) is whether A's conduct related to the protected characteristic. This is a broad test, requiring an evaluation by the Employment Tribunal of the evidence in the round — recognising, of course, that witnesses will not readily volunteer that a remark was related to a protected characteristic. In some cases the burden of proof provisions may be important, though they have not played any part in submissions on this appeal. The Equality Code says (paragraph 7.9):

‘7.9. Unwanted conduct ‘related to’ a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.’ ...”

27. The motivation and thought processes of those accused of harassment may be relevant to the question of whether their conduct amounted to harassment, see Unite the Union v Nailard [2018] IRLR 730 at paragraphs 108 -109.
28. The EAT gave some helpful guidance in the case of Richmond Pharmacology v Dhaliwal [2009] IRLR 336. It is a case relating to race discrimination, but the comments, (by Underhill P, as he then was) apply to cases of harassment in respect of any of the proscribed grounds.

“We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. 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. Whilst it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred). It is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

Burden of Proof

29. Section 136 deals with the burden of proof:

“(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.

30. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If he does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no

discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005] IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

Time

31. Section 123(1) requires that a claim of discrimination shall be brought before the end of the period of three months beginning with the date of the act to which the complaint relates or such further period as the Tribunal thinks just and equitable. Conduct extended over a period of time is treated as having been done at the end of that period, (section 123(3)).

Findings of Fact

32. These are the facts as we determine them.
33. The Respondent is in the business of removals and general haulage, mainly containers to and from ports and domestic removal operations. It has approximately 90 employees and a turnover in the ball park of £8 million.
34. Mr Gray's employment with the Respondent began on 1 February 2011. He was Assistant Transport Manager. Broadly speaking, his work entailed the day to day management of transport operations. His contract of employment is in the Bundle at page 84. We note at page 85, his normal hours of work are 40 hours per week, which may be varied to meet the needs of the business. The holiday year is from 1 April to 31 March. A detailed explanation of the holiday arrangements are said to be contained in the Employee Handbook. Page 86 refers to Sickness Absence, it states that an absent employee will receive statutory sick pay only. More details are said to be contained in the Employee Handbook. Under a heading of 'Grievance Procedure' it says that any grievance should initially be raised with one's manager. Again, cross reference is made to the Employee Handbook.
35. The Employee Handbook appears in the Bundle at page 93. It states in relation to holiday, that holidays may not be carried forward into the next holiday year. On page 94, it states in relation to absences from work for appointments, if an employee is absent for medical, dental or other essential appointments, prior permission should be obtained and payment during such absences is in the discretion of the company. Upon returning from absences, there will usually be a Return to Work interview with the manager. Page 95 reiterates that sick pay is in the form of statutory sick pay. There is no mention there of any possibility of there being full pay for absence. We also noted in the Handbook at page 116 – 117, the Equal Opportunities Policy and an Harassment Policy. At the top of page 106, there is a comment that it is vital to make the person thought to be responsible for harassment aware that his or her remarks are offensive.
36. Historically, Mr Gray was paid in full for his sickness absences, of which he only had about ten days in the ten years of service before his cancer

related absences began.

37. In March to April 2020, Mr Gray worked from home during the country's first lockdown. He says that worked very well. The Respondents say it did not. We accept that there were practical problems over the co-ordination of transport operations whilst Mr Gray was working from home during the first lockdown.
38. Mr Gray's health issues first manifested themselves in the autumn of 2021. We find a summary of what ensued in terms of his health in a consultant's letter dated 6 January 2023, which is at page 176. It is helpful to go through that and summarise it, to place what follows in context:
 - 38.1. The Consultant oncologist tells us in this letter that Mr Gray had been in receipt of treatment for Metastatic Rectal Cancer and Liver Metastases since April 2021, which was initially a combination of chemotherapy and radiotherapy completed in May 2021.
 - 38.2. He underwent a further period of chemotherapy between July and October 2021, which was on a two weekly basis.
 - 38.3. After that, Mr Gray underwent major liver surgery in January 2022, followed by additional chemotherapy between February and May 2022.
 - 38.4. He then had a further major operation on 1 September 2022 to remove his rectum, since which time, he has had a stoma.
 - 38.5. There was unfortunately further Liver Metastases and he had further surgery to his liver in November 2022.
39. That is Mr Gray's medical history up to January 2023.
40. After a series of medical appointments in January and February 2021, Mr Gray was diagnosed with Bowel Cancer and lesions on his liver.
41. Issues 1. and 2. are allegations that in February and March 2021, Mr Pearson made comments to office staff about how many times he was going to the bathroom, in a way that was intended to ridicule him and that in July, August and September 2021, Mr Pearson made comments about Mr Gray having time off for treatments, questioning if he was actually going to a hospital and that it was a joke that he had to go to so many appointments.
42. Mr Gray is not asserting that these comments were made directly to him, but he says that he was told about them by others in February 2021 and subsequently. By way of corroboration, in preparation for a grievance hearing about which we will hear later, individuals provided Mr Gray with emails confirming what they had told him in the past about comments being made about him. There are emails in the Bundle, not the original emails, but subsequent emails from those individuals at pages 410 – 414.
43. These are anonymised, but Mr Gray named the authors in cross examination on being asked to do so by me.

44. We find at page 413 somebody called 'Jackie' has said,
- "They made comments that weren't appropriate and were very upsetting to us in the office. Please don't forget I have to work there and I cannot afford to lose my job".*
45. Somebody called 'Alison' has written at page 414, that:
- "... discussions happened in the office regarding Jamie's health from the fact that he was spending too much time at appointments and milking it, to the fact that maybe he is making it up. To hear this was disgusting, that anyone could even think his health was a regular conversation in an open office. Degrading comments were also made by people who did not know Jamie at all and other people with personal issues were treated very differently..."*
46. At page 410 there is a document written, we are told, by 'Alison' in which she has confirmed to Mr Gray what she says she had told the grievance investigator. She wrote that,
- "... some members of the organisation did not believe or understand why his treatment took so long, appointments etc. and felt he was not being honest. ... Some of the staff did not believe everything Jamie said regarding that he had cancer and also discussion between management regarding personnel were often made in the open office where staff and visitors could hear..."*
47. Alison wrote that it was suggested that Mr Gray did not really have cancer and he milked his appointment times. She commented that there was no other route of reporting staff and problems or privacy in the office.
48. It is notable that these individuals do not name who was said to have made the remarks and they refer to a number of people. We also note that Mr Gray referred to Mr Pearson as being supportive at this time, see below. There is no evidence from Mr Gray in his witness statement, orally or in the documents, that comments were being made specifically by Mr Pearson. Our finding is that comments were being made in February and March about the number of times that Mr Gray was going to the toilet and in July through to September about the time he was having off for treatment, questioning whether he was actually going to the hospital and suggesting it was a joke that he had so many appointments. But those comments were not made by Mr Pearson.
49. In March 2021, Mr Gray knew that after radiotherapy, he would need the operation on his liver. He therefore asked Mr Pearson if he could carry over his untaken leave and use it the following year during his post operative recovery. He was told that he could not and that leave carry over was not permitted in accordance with his contract. He was told that he would have to take the leave, which he did. This thus far, is not disputed by the Respondent. It is alleged that in or around March 2021, Mr Pearson said to the Claimant that Mr Flynn had said to Mr Pearson with regard to this request, that he was *"already paying him to be fucking sick"*. Mr Gray says in his witness statement that this is in response to asking if his holiday could be carried over. At this point, Mr Gray had not started his radiotherapy, that was in April (pages 125 and 176). The allegation is

not that he was told he was being paid for being off sick, it was that he was being paid for being sick.

50. We find that Mr Flynn did say that which is alleged, in the context of Mr Gray asking via Mr Pearson if he could carry over his leave to the next year for his expected time off after his anticipated operation and that Mr Pearson relayed the comment to him. Whilst that was denied by Mr Flynn in his witness statement, he very honestly at the beginning of his evidence, acknowledged that was something he could have said, although he did not recall doing so.
51. In late April 2021, Mr Gray commenced a course of radiotherapy, which he completed at the end of May. He made up time for his daily absence by working through lunch times and taking work home to do in the evenings. Mr Gray acknowledged in his witness statement that at that time, he felt supported by the Respondent. We also note Mr Gray acknowledged from an email of 21 April 2021, (at page 126 of the Bundle) that he felt supported. This was an email in which it was confirmed that while he went through his initial treatment, he would continue to be paid as normal and matters would be reviewed as circumstances changed. Mr Pearson wished Mr Gray all the very best for the forthcoming treatment and the fight ahead.
52. From July through to October 2021, Mr Gray underwent chemotherapy, which involved regular two weekly visits to the hospital.
53. In September 2021, Mr Gray was informed that he would have to undergo an operation on his liver and that would be, he was told, mid to end of January 2022.
54. In November 2021, Mr Gray discussed this pending operation with Mr Pearson. Mr Pearson did suggest to him that if his operation were to clash with his planned and booked holiday on 19 – 28 January 2022, could he possibly rearrange it? Mr Gray subsequently spoke to his consultants about that appointment and planned operation and the possibility of changing the date. They said to him, in effect, “no way”.
55. Mr Gray reported back to Mr Pearson what his consultants had said and Mr Pearson responded along the lines of,

“If I can’t have my fucking holiday, I’ll go and work for Dixons or 3PL, otherwise my wife will divorce me”.
56. Mr Pearson put in place arrangements for cover to be provided by somebody called ‘Troy Ashley’.
57. On 14 January 2022, Mr Gray was informed that his operation would be on 27 January 2022 and that he must now isolate immediately for the next two weeks. Mr Gray had a discussion that day with Mr Pearson and Mr Dennis Flynn. He offered to work from home during his period of isolation. It is disputed by the Respondent that he offered to work from home, but that he did so appears to be corroborated by the email at page 133, dated 15 January 2022, addressed to Mr Dennis Flynn, Mr Bill Flynn, Mr William Flynn and Mr Pearson, in which he refers to having offered to work from

home prior to his operation and assuming that this offer is not required. We accept that he did make the offer. The Respondent did not take him up on it.

58. Mr Gray also wrote in his email of 15 January 2022, (page 133 of the Bundle),

“Please advise what holiday I have left this year. Also, since starting chemo last May I have kept track of hours I have done and accrued 87 hours in lieu additional hours worked above and beyond my expected working week and wish to know if you are going to honour this. Also as per previous communication in regards to sick pay, I also wish to know if you are paying the first five days of sickness prior to going to SSP. With this information I can calculate as and when SSP becomes applicable and I can get sick note from oncology department Addenbrookes and activate any other financial help being offered from other sources”.

59. We accept that Mr Gray or Mr Pearson, working from home in terms of carrying out their full duties, was not practicable for the same practical problems experienced during the first lockdown and also because Mr Pearson had been advised subsequently by IT that people should not be using their work IT and software at their homes, because they did not have the benefit of the Respondent’s firewall and high levels of security were required.

60. Mr Gray was absent then because of his operation, from 14 January through to 31 March 2022.

61. We return to the emails. He wrote a further email on 18 January 2021 asking effectively for a response to the earlier email of 15 January 2021. Mr William Flynn replied, *“eight days holiday left Jamie”*. Mr Gray replied to ask for clarification as to whether they were going to pay any sick pay and acknowledge the additional hours that he had accrued, which he wanted to use in lieu of time off.

62. We then go to page 135 of the Bundle, at the top we see a reply from Mr William Flynn on 18 January 2022,

“I am sure the sick pay will be paid. Sick pay can start after three days. The accrued hours are a different matter, how we decide to deal with them at this moment will be decided in our own time.”

63. Mr William Flynn goes on in that email to ask whether Mr Gray would like his eight days accrued holiday to be paid in lieu.

64. Mr Gray responded (at the bottom of page 134 of the Bundle), trying to double check whether when Mr Flynn refers to sick pay, did he mean normal pay or statutory sick pay (SSP), he wanted to be clear so that he could get advice from Macmillan’s, “financial people” and so that he can activate support.

65. Mr Flynn replies a few minutes later in capital letters,

“AT THE MOMENT SSP”

66. The capital letters were, Mr Flynn acknowledged, used to reflect the fact that he was as he described it, somewhat vexed by this correspondence.
67. Mr Gray replied to thank him for his answers and said that he was disappointed.
68. Mr Troy Ashley covered for Mr Pearson and Mr Gray whilst Mr Gray was absent and Mr Pearson was on holiday, with access to Mr Pearson by telephone whilst he was away. We note at page 138, an email from Mr Gray offering to help but that does not appear to have been picked up.
69. There are more emails about pay on 26 January 2022 at page 140 going back to page 139.
70. On 26 January 2022, Mr Gray wrote to Mr Flynn querying that Mr Flynn had used the expression *“at the moment”* in terms of SSP and querying the fact that in the past, he had received pay in full for absences through sickness. He also asks that they honour his 87 accrued hours and he confirms that his remaining eight days annual leave should be taken from 22 – 31 March 2022, subject to his recovery.
71. Mr Flynn replied on 28 January 2022, (page 139 of the Bundle). He says that whilst he appreciates Mr Gray is very ill he feels he has been treated fairly by the company. He makes the point that they had allowed him to take time off to attend his appointments and paid him his salary without deductions. He says,
- “I presume you have made up the time off with extra hours at work to compensate.”*
72. With regard to the 87 hours accrued time, Mr Flynn said that they would have to go through each of the cards on which Mr Gray had recorded these times and check his calculations. He says they won't be paying for lunches because they have a duty of care to make sure they don't condone people not taking their statutory rest break. He says that going forward, overtime would have to be approved, even if retrospectively, by Mr Gray's superior. With regard to the annual leave outstanding of eight days, he says that if Mr Gray takes that as leave that is fine, but if he is still off sick they offer to pay him those eight days in lieu before 5 April 2022. He confirms that they do usually only pay statutory sick pay for long term absence. He concludes by saying that he understands Mr Gray is stressed but does not accept the company is responsible for any of that stress.
73. From these we can see that amongst other things, it is not correct for Mr Gray to say that he did not get a reply about sick pay until February, (Issue 6). There is no evidence of any intervention by Macmillan, nor that he was asking Mr Pearson and not getting a reply, because Mr Pearson was on leave between 19 – 28 January 2022.
74. On 27 January 2022, Mr Gray had his nine hour liver operation. For that reason he may not have known of Mr Flynn's reply until February, because he may not have looked at his emails. It has to be said that the Respondents did respond.

75. Mr Gray underwent additional chemotherapy between February and May 2022.
76. On 18 February 2022, Mr Gray wrote a further letter emailed to Mr Flynn (at page 144 of the Bundle), addressing again the issues of pay and sickness absence, but also responding to Mr Flynn's suggestion that the company was not responsible for any of his stress, making reference to what he had been told about what people were saying about him in his absence.
77. Next we come to an email from Mr Pearson to Mr Flynn, (at page 146). Somebody called Jacqueline had circulated an email explaining that they were making a collection for Mr Gray, planning to send him a gift and a card. Mr Pearson wrote a very short email to Mr Flynn which reads,
- "Can't wait to donate to such a worthy cause – NOT"*
78. That email was printed by Mr Gray whilst accessing Mr Pearson's emails in his absence, which does him, Mr Gray, no credit.
79. Mr Pearson and indeed Mr Flynn, did not donate to that gift and did not sign the card.
80. On 14 March 2022, Mr Gray told the Respondent that he was planning to return to work on 6 April 2022, see the email in the Bundle at page 433, dated 14 March 2022. Mr Gray to Mr Pearson,
- "I have an appointment with oncologist 24th March 2022, if everything is ok you may or may not be pleased to hear that I am planning to return on 6th April.*
- ...
- I have booked my last eight days holiday between 25th of March and 5th of April."*
81. From page 433 of the Bundle, we can also see that Mr Pearson makes a reference on 14 March 2022, to having interviewed somebody as an additional Transport Planner who is going to start on 28 March 2022. That somebody is a gentleman called Mr John Hicks. Mr Hicks started on 28 March 2022. He was given Mr Gray's IT equipment to use and he sat opposite Mr Pearson at the desk Mr Gray would otherwise have been using.
82. The week before his return to work, Mr Pearson went in to work and when he was there, saw Mr Hicks doing his job sitting at that desk. On 1 April 2022 (page 148 of the Bundle) Mr Flynn wrote to Mr Pearson about some hospitality that the Respondents were going to take advantage of involving Mildenhall Football Club. He wrote, "I won't be asking Jamie!"
83. Again, this is an email which Mr Gray, to his discredit, accessed via Mr Pearson's email account.
84. On 5 April 2022, there was an email exchange with Mr Pearson in which Mr Gray refers to his plans to return to the office the next day and asks

whether the office and computer will be back in place. Mr Pearson replies that they will need to set everything up on the computer in reception, which we understand to be a reference to the room they had set aside for Mr Gray to use on his return. It is suggested there will need to be a Return to Work Interview with either somebody called Joanne or Mr Flynn. It was suggested that he attends work for 9am.

85. In fact on 6 April 2022, Mr Gray attended work at 8:15am.
86. Although Issue 9 in the List of Issues sets out that Mr Gray says he was refused carry over of leave in March 2022, in fact no such request to carry over leave seems to have been made. At the time Mr Gray returned to work on 6 April 2022, he had two or three weeks of chemotherapy still to go through.
87. When Mr Gray arrived at work on 6 April 2022, Mr Hicks was absent due to having Covid. Mr Gray's equipment was still at his old desk. Mr Gray moved his equipment into the isolation room that had been set up for his use. No Return to Work Interview was carried out. Mr Gray was told that Joanne was not available. Mr Pearson spoke to Mr Gray, but clearly not in the form of conducting a formal Return to Work Interview. Mr Gray told Mr Pearson that he was feeling lethargic and that he got very tired. Mr Pearson said that he would not ask him to run before he could walk. That said, no clear instructions were given to Mr Gray about what he was to do, apart from managing the drivers' tachograph downloads.
88. Mr Hicks returned to work the next day, 7 April 2022. There is a conflict between the parties. Mr Pearson says that Mr Hicks worked with him at the desk opposite where he worked, so that he could train him. Mr Gray says that Mr Hicks went into his isolation room and worked with him. We find that there is an element of truth in both accounts. Mr Hicks' workstation was with Mr Pearson, but he went into the room with Mr Gray at Mr Gray's invitation to work with him. We agree that it is most odd if Mr Gray was undergoing chemotherapy that the Respondent would expect, or indeed that Mr Gray would allow, Mr Hicks returning from Covid to sit with him in the same room in proximity. We cannot imagine Mr Gray allowing Mr Hicks to be immediately put in a room with him on his return from Covid and we are sure there would have been howls of protest if he had been, in the context that he was still undergoing chemotherapy. With the passage of time, doubtless Mr Hicks did start going into that room and working with Mr Gray.
89. There was only one set of computer equipment for use by Mr Hicks and Mr Gray between them to begin with. New equipment was ordered by Mr Pearson and it was installed on 13 April 2022, where it was set up for Mr Hicks' use sitting opposite Mr Pearson.
90. We note emails at pages 155 – 157 of the Bundle:
 - 90.1. On 6 May 2022, Mr Gray wrote to Mr Pearson with the subject heading "Anything you want me to do" and the text of the message was "pretty boring here".
 - 90.2. Secondly, an email of 9 May 2022, subject heading "Me", the text of

the email reading, "John pretty much flying with his own wings now, what are your plans for me going forward please?"

- 90.3. Thirdly, an email to Mr Pearson from Mr Gray of 23 May 2022, sub-heading "Good morning" and the text, "now John back from his op and at the helm, any idea what I am supposed to be doing yet?"
91. Mr Gray did not receive a reply to any of these emails.
92. It is an issue between the parties whether Mr Gray was given tasks to do by Mr Pearson. Mr Gray says he was not. Those emails that we have just looked at corroborate that Mr Gray was not given sufficient work to do and we accept he was not given tasks to do other than allocating and monitoring tachograph downloads.
93. On 25 July 2022, both Mr Gray and Mr Hicks, (who seems to be extraordinarily unlucky when it comes to Covid) were ill with Covid.
94. Mr Gray sent a text message to Mr Pearson to explain that he had tested positive for Covid. Mr Pearson replied to say that he'd check with Mr Flynn, but so far nobody with Covid had been paid whilst they were off with it. Mr Gray wrote, "have told John if he needs help to call me".
95. Mr Gray says that he sent an email to Mr Pearson offering to work from home and that he did not get a reply. Mr Pearson says he never got that email. Mr Gray says he cannot produce a copy of the email because it was written on his old iPad which no longer works. He told us in evidence that it had not occurred to him to try and access that via another device.
96. Mr Gray had a similar problem with the email we looked at earlier at page 433. A copy appears in the Bundle because the Respondents produced it late, we understand, and they produced it because of the content of Mr Pearson's reply at the top of the page. One wonders whether the Respondents might also then have found Mr Gray's email of 25 July 2022. However, we have no such evidence before us.
97. Mr Pearson's evidence is that Mr Hicks was not asked to work from home and that he had taken sick leave. He also says that Mr Gray did not ask him if he could work from home. With regard to Mr Hicks, that is a bold statement for Mr Pearson to have made on Oath understanding the significance of that, if it is not true, because it is capable of being checked. We have accepted already that the Respondent had a good reason not to allow its Traffic Planners and Managers to work from home and so we accept it would not have allowed Mr Hicks nor Mr Gray to do their normal duties working from home.
98. Given the text message which we have quoted, it is clear Mr Gray was communicating by text rather than email. From that it is clear he thinks that Mr Hicks is working and he has offered to help if need be. We also note from the Grievance that he subsequently submits at page 165 of the Bundle - point 11, where he wrote that he had heard nothing but John was asked to work from home. We therefore find that John was doing some work from home, but we would accept not his full normal duties.

99. Mr Gray was signed off work due to work related stress after his Covid absence in August 2022 and he has not returned. He remains employed but absent from work due to ill health to this day. As we have heard, on 1 September 2022 he underwent surgery to remove his rectum.
100. On 15 November 2022, he submitted a Grievance about his perceptions of what had gone on hitherto, it is at page 164 of the Bundle. We do not need to go through the detail of that for the purposes of deciding the issues in this case. The Respondents appointed an organisation called Face to Face to deal with the Grievance. Mr Gray underwent his liver surgery on 27 November 2022. Face to Face sought to arrange a hearing of the Grievance on 30 November 2022. Mr Gray's wife wrote to Mr Flynn on 29 November 2022, following up on a conversation the previous day, confirming that Mr Gray was in Addenbrooke's recovering from his liver surgery and would not be attending the hearing on 30 November 2022. She complained that the Respondents knew about this surgery, they had been informed of it on 24 November 2022. She said that Mr Gray would be happy to attend such a meeting in the New Year.
101. On 13 January 2023, (page 179 of the Bundle) Mr Gray wrote to Mr Pearson and Mr Flynn asking for a copy of the Grievance Policy, Absence Policy and his job description and stating that he would be available to meet with the Respondent's HR people on a Friday between 9am and 2pm.
102. Mr Flynn replied a few minutes later to say his job description was in the Contract of Employment, the Grievance Procedure and Absence Policy were in the Employees Handbook and he said he will pass him over to what he called, "the one to one people", (he must have meant Face to Face) so that they can arrange a meeting with him.
103. There follows an exchange of emails on 14 January 2023, (page 180 of the Bundle) in which Mr Gray says that his company Handbook is dated 2015 and there were no procedures in it, that his Contract does not contain a job description and he asked for those things to be forwarded to him. Mr Flynn replied,
- "Ok I am blocking you and leave you to address your concerns to our advisors. I am really not in a position to reply to you."
104. On 9 February 2023, Mr Gray wrote that he had not received a response either from Mr Flynn or from their Representatives and it was now nearly a month and pointing out they were not proceeding in line with company Policy, which called for the matter to be dealt with within five working days.
105. Mr Flynn replied,
- "Is this the same grievance that you lodged on 15 / 11 or is it another one. If you want to proceed with the original grievance again, I will forward it to our advisors and you can initiate the process again."
106. Mr Gray replied a little later, significantly there at page 185 at the top,
- "At no point did I tell you I did not want to proceed with my Grievance and I

am confused.”

107. Mr Flynn replied, (page 184 of the Bundle) saying they had initiated the process straight away originally, cross referring to Mr Gray’s email of 13 January 2023, he wrote,

“I didn’t bother passing on such a request to be honest.”

108. And at the end of his email he wrote,

“Unfortunately Jamie I don’t really have time to do things like that.”

109. On 21 February 2023, (at page 189 of the Bundle) a letter was written to Mr Gray inviting him to attend a Grievance Hearing on 24 February 2023.

110. Mr Gray was unable to attend that and so it was rearranged for 27 February 2023, (at page 192).

111. Mr Gray subsequently declined to attend the Grievance Meeting, overtly he said because it was being recorded although he told us in fact it was because he had been advised it would not be good for his mental health to do so. Face to Face subsequently permitted him to answer questions in writing. There is no complaint about any of that, or about the outcome of the Grievance, in the issues before us.

112. On the comparators that had been referred to:

112.1. First is a person called Rachael Ward, formerly Giggs. She was absent from work at short notice for a triple bypass. During her absence she was paid in full for the first two months of her absence. Mr Flynn told us that she worked for him, he did not say in what capacity. He described her circumstances as exceptional. When asked by Mr Gray in cross examination why his circumstances were not exceptional, he was undergoing an operation on his liver to remove nine tumours, Mr Flynn’s response was expressly that he refused to answer. Pressed by the Tribunal, he said he did not regard Mr Gray’s circumstances as exceptional and that it was a matter of discretion. He was unable to explain coherently the difference between the circumstances of Ms Ward and Mr Gray. When asked what he would take into account when exercising discretion, he referred to home circumstances, domestic circumstances, the amount of time the person would be off and whether the absence was as a result of an accident at work in the course of performing duties. In his Witness Statement at paragraph 32, Mr Flynn explained that Ms Ward’s operation was unexpected and not planned.

112.2. Another comparator is Mr Patrick Hunt, who was a Driver. We acknowledge that arranging cover for a Driver would be easier for the Respondents to arrange. Mr Patrick Hunt was allowed to carry holiday over from one year to the next because he was visiting family in Thailand.

112.3. Similarly, another driver called Mr Barry Horne was allowed to carry over holiday so that he could visit family in Australia.

Conclusions

Harassment

113. We should consider the case of harassment first because if we are to find any upheld allegation amounts to harassment, it is by s.212, excluded from amounting to direct discrimination. Harassment is excluded from the definition of detriment.

114. On our findings of fact, we have upheld the following allegations:-

Issues 1 and 2

115. We have found that comments were made about Mr Gray during February and March and between July and September 2021 and he was informed of that at the time. We have found that the comments were not made by Mr Pearson, but Mr Pearson was the most senior person in the Claimant's place of work at the time. The Respondents allowed a culture to prevail where people commented on and ridiculed the number of times that Mr Gray went to the toilet, about the amount of time he had off for treatment, questioning whether he was really going to appointments and suggesting that it was a joke that he had so many appointments.

116. Mr Gray was aware of this because he was told about it at the time. These matters are obviously related to his disability.

Issue 3

117. In the context of answering a request from Mr Gray via Mr Pearson that he be allowed to carry over untaken leave in March 2021, Mr Flynn did respond, *"I am already paying him for being fucking sick"*. That was clearly a matter related to disability. He wanted to carry over the leave because of his disability.

Issue 4

118. Mr Pearson did suggest to Mr Gray that he reschedule his operation if his operation was scheduled to clash with his planned leave. On being told by Mr Gray that it could or would clash and could not be rescheduled, he did make the alleged remark,

"If I can't have my fucking holiday I'll go and work for Dixons or 3PL, otherwise my wife will divorce me."

119. These were matters related to Mr Gray's disability and all to do with his operation because of his disability.

Issue 5

120. On 14 January 2022, the Respondent did not take up Mr Gray's offer to work from home during his period of isolation before his pending operation. We found it was reasonable of them not to have taken up that offer, given the particular difficulties in doing so.

Issues 7 and 8

121. Mr Pearson and Mr Flynn did write the emails as alleged. They are not denied and the emails are before us. Their explanations for those emails were frankly, not remotely credible. We find that they were related to Mr Gray's disability in that there was irritation felt towards him because of the amount of time he was taking off and the impact of his illness on his general performance at work. However, caution is required, one cannot be harassed by what one does not know about and these were private emails, not intended for Mr Gray to see. They do, however, corroborate Mr Gray's case on the Respondent's attitude towards him and that he was working in a hostile work environment that was permitted to prevail and which was therefore related to his disability.

Issue 9

122. Mr Gray's request to be allowed to carry over leave in March 2021 was refused, but not in March 2022. This was related to his disability. He wanted to carry over leave so that he could manage his recovery from his operation with some paid annual leave. That is in the context of others being allowed to carry forward leave to visit relatives abroad.

Issue 10

123. There was no Return to Work Interview on 6 April 2022. There were no discussions about what adjustments could be made. Ordinarily one would expect to see a referral to Occupational Health, or at very least enquiries made of the individual's GP and consideration given to for example a phased return to work, to reduced hours, to a discussion about what duties could and could not be performed. None of that took place. There were no clear instructions to Mr Gray and what he was to do.

Issue 13

124. When Mr Gray came back to work on 6 April 2022, no work was given to him other than dealing with the tachographs. Mr Pearson did not reply to his emails asking for work, indicating that he was bored. This relates to his disability. His duties had been taken from him because he had been away from work for an operation in relation to his cancer and not returned to him because the Respondent had recruited a replacement. To be clear, we are not criticising the Respondent for recruiting Mr Hicks, they clearly had to do something to cover for Mr Gray's absences.

Issue 14

125. Mr Gray did ask Mr Pearson in one of his emails in May 2022, what his plans for him were and he did not get a reply. That was related to his disability. The Respondent's plans for Mr Gray's future were in doubt because of his disability and his absences.

Issue 16

126. At page 169 of the Bundle we see Mr Gray's wife, on 29 November 2022, clearly indicating there is no question of Mr Gray dropping his Grievance and the Respondents invited to arrange a new meeting in the New Year. That was not acted upon.

127. On 13 January 2023, (at page 179) Mr Gray clearly invited the Respondent to contact him to arrange a meeting and we know Mr Flynn ignored that, his email at page 184 of the Bundle, he did not bother passing it on. At page 183, Mr Gray had to chase on 9 February 2023, almost a month later. There is the delay.
128. In addition, we have the “blocking you” comment at page 180, the email of 14 January 2023.
129. And, we have the sarcastic comment on 9 February 2023, “is this the same grievance or another one”. It is obviously the same grievance and Mr Flynn knows that very well. It is indicative of the Respondent’s attitude towards Mr Gray, which is hostile.
130. That hostility, that disinclination to proceed timeously, is related to Mr Gray’s disability. The Respondent’s attitude to Mr Gray is because of his absences and his reduced performance and the Grievance is about matters to do with his cancer and the way he has been treated.
131. Looked at overall, these matters without doubt amount to unwanted conduct which relates to Mr Gray’s disability and which created, having regard to his perception and the surrounding circumstances of the case, a hostile working environment for him. It was reasonable for Mr Gray to perceive the conduct that he complains of creating that hostile environment.

Time

132. On the question of time, the latest incident was the delay in arranging the Grievance Hearing. The Respondents finally invited Mr Gray to a Grievance Hearing by letter dated 21 February 2023. Mr Gray started Early Conciliation on 15 March 2023, which is within three months and he issued his claim on 1 May 2023, within five days of the Conciliation period ending on 26 April 2023.
133. The Claim is in time in relation to the last incident.
134. All of the incidents arise out of the same hostile attitude towards Mr Gray by the Respondent’s Management, including their permitting the nasty comments being made about him in 2021. They all amount to a continuing act.
135. The claims are therefore in time.
136. Mr Gray, the finding of this Tribunal is that you were harassed contrary to the Equality Act 2010 and your claim for harassment therefore succeeds.

Direct Disability Discrimination

137. The allegations we have upheld that are not harassment are Mr Pearson’s email about not making a donation, Mr Flynn’s email about not inviting Mr Gray to Mildenhall Football Club and not allowing Mr Gray to work from home when isolating. All of those amount to detriments.

- 138. The problem with direct disability discrimination is that the comparator must be a person in the same circumstances as the Claimant, but who is not disabled. See The London Borough of Lewisham v Malcolm.
- 139. What this means is that the reason, the motive of the decision maker, must be that the Claimant is disabled. The hypothetical comparator, (no actual comparator is appropriate) must be a person who is ill but not disabled, who has had to have the same number of absences for appointments, has undergone the same periods of absence for treatment and operations and whose work has been affected in the same way as had Mr Gray's.
- 140. Mr Pearson, we find, would still have made the unpleasant remark about not making a donation for such a person. Mr Flynn would still not have invited that person to the event at Mildenhall Football Club. The Respondent would still have declined that person's offer to work from home when they were required to self-isolate.
- 141. There are no facts from which we could conclude otherwise. The burden of proof does not shift to the Respondent. There is no difference in treatment.
- 142. The complaint of direct disability discrimination on those three allegations therefore fails.

Remedy

- 143. During an adjournment, the parties agreed that the Respondent would pay Mr Gray compensation on the sum of £30,000 in settlement of his claim. We gave Judgment by consent accordingly.

Employment Judge M Warren

Date: 28 March 2024

Judgment sent to the parties on
4 April 2024

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For the Tribunal office

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>