EMPLOYMENT TRIBUNALS

Claimant: Mr B Masood

Respondent: Penn Pharmaceutical Services Ltd

Heard at: Cardiff and by video

On: 18, 19, 20 December 2023 25 January 2024 and 12 March 2024

Before: Employment Judge S Moore
Ms A Fine
Mr S Head

Representation
Claimant: Mrs Masood
Respondent: Ms Keogh, Counsel

RESERVED JUDGMENT

1. The complaint of direct disability discrimination is not well-founded and is dismissed.
2. The complaint of indirect disability discrimination is not well-founded and is dismissed.
3. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.
4. The complaint of failure to make reasonable adjustments is not well-founded and is dismissed.
5. The complaint of harassment related to disability is not well-founded and is dismissed.
6. The complaint of wrongful dismissal is not well-founded and is dismissed.

REASONS

Background and introduction

1. The claimant contacted ACAS for early conciliation on 18 November 2022 and the certificate was issued on 8 December 2022. The ET1 was presented on 6 January 2023. The claimant is a litigant in person. It was

understood he was bringing claims of direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments. At a preliminary hearing before Judge Cadney on 24 May 2023 it was recorded that the claimant asserted he was also bringing claims of harassment and wrongful dismissal. The respondent took the view this did not require an amendment but further and better particulars which were duly provided on 1 June 2023. At the time, it does not appear to have been identified that the further and better particulars significantly explained the claim, probably because the respondent dealt with those expanded claims in their amended response and did not object.

2. The hearing was listed to take place on 21 – 23 August 2023 but was postponed on application by the claimant due to ill health.

The hearing

3. The hearing took place as a hybrid hearing. The claimant joined by video. The respondent and the Tribunal were in person at Cardiff Employment Tribunal hearing centre on 18, 19, 20 December 2023. There were a number of issues that caused the hearing to go part heard and it was relisted on 25 January 2024 with written submissions thereafter. The Tribunal sat on 12 March 2024 by video to reach their decision hence the reserved reasons below.

4. The following reasonable adjustments were made:

- The claimant reported that due to his bipolar disorder related insomnia and anxiety, his concentration and energy levels will drop affecting his concentration.

- The Tribunal took 10-minute breaks every hour and allowed the claimant more time to respond to questions.

- The claimant's representative also required regular breaks and to request brief unscheduled break on occasions to relieve build up of pain.

- The respondent's representative was permitted to have her mobile phone in order to operate a health-based app when required.

Documents and witnesses

5. There was an agreed bundle of 348 pages and supplementary medical bundle of 61 pages including the claimant's impact statement. For the claimant, we heard evidence from the claimant and Mr H Jalil. For the respondent, we heard evidence from Mr C White (Vice President), Nicola Hill (Senior Manager HR) and Mr Tippings Graham (HR Advisor).

List of issues and amendment application

6. On 1 December 2023 the respondent wrote to the Tribunal advising matters were on course to be ready for the final hearing. In this letter they highlighted the issue with the expansion of the claim in the further and better particulars and that there had been no application to amend. In

response, the claimant had sent an email on 6 December 2023 which sought to amend the claim to include the claims advanced under the further particulars. Unfortunately this was not addressed before the final hearing and the whole of the first day and part of day two was spent considering what needed an amendment, finalising the list of issues and deciding the amendment application. The respondent had taken the position that they wished to be practical and did not object to the application to amend generally save for the addition of a new disability (asthma) and the new payslip claim. The following matters required clarification before the hearing proceeded:

(i) The disability pursued – this was confirmed at the PH to be bipolar disorder, however the Further and Better Particulars also referred to asthma.

(ii) The precise PCPs relied upon by in respect of the Indirect Discrimination and Reasonable Adjustment claims. Counsel had tried to identify appropriate PCPs on a draft list of issues.

(iii) The substantial disadvantage(s) said to arise in relation to each PCP.

(iv) The dates on which the claimant contended incidents occurred and the dates by which he contends reasonable adjustments ought to have been made.

(v) With regards to the unauthorised deductions from wages complaint in respect of 3.5 days of sick pay there were no particulars of this claim.

7. As there was not a final list of issues the Tribunal sought to agree this with the parties at the outset of the hearing. Ms Keogh had helpfully prepared a draft list of issues. After a lengthy discussion a revised list of issues was updated by Judge Moore and sent to the claimant for approval setting out which matters required an amendment . The parties were provided with the revised list of issues after lunch on 18 December 2023 and the claimant was asked to confirm a number of matters namely the substantial disadvantages for the PCP's, confirm he agreed with the revised list of issues and set out an application to amend the claim.

8. The hearing was then adjourned until the morning of 19 December 2023 to enable the claimant to have time to address these matters.

9. On morning of 19 December 2023 the claimant's representatives had sent the required information and the Tribunal heard the application to amend.

Decision on application to amend

10. The application to reply on asthma as a disability and add a new claim for failure to provide pay slips was refused. Full reasons were provided at the hearing. In summary these were refused as they were entirely new matters which would have necessitated an adjournment of the hearing as

the respondent was not in a position to address the claims in evidence and as such the balance of prejudice weighed in favour of the respondent. Both claims were also out of time. The application to add a new direct discrimination complaint and a new claim of indirect disability discrimination was permitted as there was no prejudice to the respondent who were prepared to deal with the allegations.

11. Evidence began on mid morning on day 2.

Findings of fact

Claimant's disability

12. It was accepted that the claimant was at all relevant times a disabled person within the meaning of s6 Equality Act 2010 ("EA 2010") by reason of bipolar disorder.

13. The claimant's impact statement set out the following information about his disability affected his ability to carry out day to day activities.

14. At time of employment the claimant's insomnia levels were high and he was struggling to sleep and to leave his bed. He described having "regular mental breakdowns" and would often sleep in his uniform as he had no energy to change clothes at night or in the morning. He was suffering from extremely low mood which worsened as his employment progressed. He had extreme thoughts of suicide and felt as though everyone was against him. His anxiety levels were also very high with racing mind throughout the night and low energy levels.

15. The claimant described a wide range of very personal and sensitive symptoms of his impairment. It is not necessary to set all of these out in this judgment but we set out the relevant ones in respect of how the claimant's behaviours may have impacted on the issues in the claim. We accepted his evidence about how his impairment was affecting him at the time however we deal with the respondent's knowledge of these symptoms below. These were manic/hypomanic Episodes, depressive episodes, extreme insomnia, difficulty leaving the bed due to feeling paralysed, either little to no motivation to do anything or having extreme motivation to do anything, high levels of anxiety/agitation. Feel slightly less uncomfortable talking over the telephone otherwise need to be prompted to speak. Was also getting overly anxious if expecting a phone call in advance. Was not engaging in conversations with people, especially if unfamiliar, and was often zoning out due to lack of concentration and often cutting short the conversation short with one-word answers. When the claimant was either manic/hypomanic he would tend to talk at 100 mph with thoughts constantly rushing through his head and people would often struggle to understand what he said and he would often have to repeat. He struggled to retain information and had feelings of dissociation and intrusive thoughts that would completely take over.

Claimant's recruitment

16. Post offer the claimant disclosed his diagnosis of bipolar disorder and had an assessment with Occupational health (by telephone) on 10 June 2022. He was declared currently stable and managed by his GP but the OH provider wished to assess him in person; reasons provided that he was going to be working in the lab. The claimant's role involved testing hazardous materials. The respondent was not specifically informed that the claimant had bi-polar. The OH reported he had an "ongoing chronic medical condition".

The respondent's business and the claimant's work environment

17. The respondent is a global organisation that provides pharmaceutical manufacturing and drug development services. This involves specialist handling of highly potent products. The claimant was employed at the Tredegar site which had approximately 450-500 employees the majority of which worked in the labs.

18. The claimant relocated from his family home in Bradford to South Wales to take up the role. His contract of employment, signed as received by the claimant on 30 May 2022 provided for the following contractual terms and conditions:

(i) Days/ Hours of work – Monday to Friday 08.30 to 16.30, 37.5 hours per week during training period, Lab shift (after training period 12 weeks);

(ii) Break entitlement – 30 minutes lunch break, unpaid, 2 x 10-minute breaks – paid;

(iii) A probationary period of 3 months which could be extended and during which the claimant's employment could be terminated; if termination occurred during the probationary period the period of notice due would be one week;

(iv) There was a specific right to make a payment in lieu of notice ("PILON");

(v) Sickness and sick pay were covered in the Sickness Absence Policy. The claimant accepted that he had access to the policy which was on Compliance Wire (the respondent's learning management system) but he was unable to print off a copy until he was provided with a lanyard

(vi) The contract provided that copies of all rules, policies and procedures were available from Human Resources.

Sickness Absence Policy

19. Regarding reporting requirements, this provided as follows:

If you cannot attend work because you are ill or injured you should normally telephone your line manager or Human Resource Department as early as possible and no later than 30 minutes after the time when you are normally expected to start work.

For sickness absence of up to seven calendar days you must complete a return to work (RTW) interview form which is available from your line manager.

SICK PAY

You may be entitled to Statutory Sick Pay (SSP) if you satisfy the relevant statutory requirements. Qualifying days for SSP are Monday to Friday, or as set out in your employment contract. The rate of SSP is set by the government in April each year. No SSP is payable for the first three consecutive days of absence. It starts on the fourth day of absence and may be payable for up to 28 weeks.

Compliance wire

20. This is the respondent's learning management system. It contains records of access to and completion of training materials, including policies and procedures. It is linked to the Quality Management system which is important and necessary given the heavy regulation of the pharmaceutical industry. This prompts employees when documents need to be reviewed and notifies HR if they are read and reviewed as required. This was the main element of the claimant's training during his probationary period.

Claimant's duties and Role

21. The claimant was employee as an Analyst. This involved stability trial testing via different means of chemical testing.

22. He commenced employment on 4 July 2023.

23. Within the first week he attended two induction sessions with other new starters. The initial session covered general matters of induction including access to systems, hours of work and how to report sickness absence. He was required to spend the first few weeks reviewing a full list of general policies and procedures and lab specific policies. On 28 July 2022 the claimant was recorded as having accessed the sickness absence policy on the system.

24. During the first two weeks of his employment his line manager, Ms Davies was off sick with Covid.

25. The respondent asserts he was provided with access to the IT systems and compliance wire on the first day. The claimant asserted he did not have access to emails or Microsoft Teams or a clocking in card. Mr Tippings-Graham told the Tribunal that the claimant could not have accessed compliance wire if he did not have access to his systems user account. We accepted he had access to the IT systems and compliance wire from the first day.

26. We find as of 22 July 2022 the claimant did not have access to emails as his line manager records as such in a message to HR (advising a ticket had been raised to IT but not yet resolved). He also did not have a

clocking in card until 25 July 2022 at the earliest as this is when Mr Tippings-Graham told Ms Davies the card was ready. Up until then the claimant's hours were recorded manually.

27. The claimant alleges that he was not provided with a lanyard for the first few weeks of his employment. He explained under cross examination by this he meant the ID badge / clocking in card. Mr Tippings-Graham's evidence was that the claimant would have been photographed at the induction for the production of a lanyard and that he was provided with one and a fob on the first day as without these the claimant would not have been able to access the site. Mr Jalil told the Tribunal that his and the claimant's ID cards were issued 7-10 days the induction.

28. The claimant must have been provided with some sort of ID initially as it is implausible that the claimant could have access the site without ID given the sensitive nature of the respondent's business. It is certain that by 19 August 2022 he had been provided with one as he was recorded as being late clocking in as he had forgotten his lanyard.

29. The claimant was experiencing difficulties in registering as a new patient with his GP practice and was running out of medication and experiencing insomnia. He called in sick on 8 July 2022 by telephoning reception. There was also another absence although this is unclear when which was labelled "unauthorised hospital leave". He also had 11 – 15 July 2022 as pre booked annual leave.

30. On 18 July 2022 he returned to work and met his line manager for the first time. Ms Davies completed a 1-1 meeting form following this meeting which was a rolling record of her meetings with the claimant. This was not a formal return to work meeting as provided for in the Sickness Absence policy. At this time, return to work interviews were not being carried out contrary to the policy and this affected multiple employees.

31. The claimant's case was that Ms Davies offered the claimant her personal mobile number at that meeting in an attempt to be supportive. Ms Davies subsequently denied ever having offered her number

32. On 22 July 2022 Ms Davies contacted HR for some advice regarding this claimant, observing he was *"taking the mic".* She reported he had been late for work and training, not turning up until 9 – 9.30am, commenting he would wait until Ms Davies left then leave early. Other issues recorded were inappropriate work attire as the claimant was rolling his trousers up to his knees and wearing safety goggles on the top of his head, not working his full hours, using his mobile phone in lab taking calls in the foyer, general bad attitude and not attending team meetings. At this point the claimant had been late every day for the first two weeks of his employment.

33. The claimant was asked about rolling up his trousers under cross examination. He accepted that he had been told not to do this several times by Ms Davies and that rolling up his trousers had nothing to do with his disability. It remained unclear to the Tribunal why the claimant had rolled up his trousers.

34. After sending this message Ms Davies sent a further message advising she had met with the claimant and raised the above issues. She recorded that the claimant "*opened up about his antics and said he has a split personality / bipolar disorder. Think this one will be hard to manage."* She noted that the claimant had informed her of his problems sleeping and had issues with afternoons on his own and getting up at 6am.

35. Ms Davies noted the claimant would need time off to arrange help and medication. It was confirmed that OH was due to undertake an assessment on the following Tuesday 26 July 2022 at 10.15.

Occupational health appointment and meeting on 26 July 2022

36. The record of the chat between Mr Tippings-Graham and Ms Davies show that the claimant returned from the OH appointment at 12.19 pm and went to the smoking shelter to take a break.

37. The claimant says the appointment ran over. When he returned he was asked to attend a meeting with Ms Davies and Mr Tippings-Graham. The note of this meeting was in the rolling note kept by Ms Davies referred to in paragraph 30 above. This recorded that Ms Davies had also spoken to the claimant about asking for her personal mobile, moving his car around the site multiple times per day and his probing regarding the sickness policy.

38. Mr Tippings-Graham's evidence was that there was a discussion at the meeting on how the claimant could be supported and that the claimant had asked to move to the late shift but this could not be supported as he was still in his training period. He also explained to the claimant that he should not continue to ask for Ms Davies personal mobile number as it was inappropriate. It was also said to have been agreed he would be permitted to keep his phone on in case of calls from his GP. These discussions were not recorded in Ms Davies' note but we accept they were discussed as they were referenced later.

39. At this meeting it was agreed the claimant could have flexibility by not attending the Monday morning 8am meeting and he should aim to start work at 9am and aim to come in for the team meeting at 8.30am on the rest of the week. This was in fact his contractual start time in any event.

40. After the meeting, Mr Tippings-Graham wrote down his number on a slip of paper and told the claimant he could call him if he was going to be late or not attend work, as well as the reception and Ms Davies landline.

41. On 28 July 2022 the respondent arranged for a further OH appointment with a specialist following the recommendation of the onsite advisor the claimant had seen on 26 July 2022.

42. On 29 July 2022 Ms Davies recorded on the rolling one to one meeting notes further issues. It was recorded that the claimant had commented to a colleague *"do you realise where I'm from people get stabbed"* which had made the colleague feel uneasy and that another female employee had

approached Ms Davis to raise concerns about his behaviour alleging he came across as a "*Stalker"* as he was asking her multiple times where she was leaving for work, then said he would go visit her as he needed to know where she was, "*what was going to happen as he was losing his best friend"*, and had acted in a flirtatious manner and making statements about their age difference.

43. On 1 August 2022 Ms Davies reported further issues to Mr Tippings-Graham. The claimant had attended work but asked to go home as a friend who was staying with him was unwell and this was worsening his mental health. The claimant had asked again for Ms Davies personal number and about the sickness policy. As noted above on 28 July 2022 the claimant had access and read this policy.

44. Mr Tippings-Graham arranged for Ms Davies to meet (via Teams) with senior HR for support.

45. The claimant's evidence was that he attended a further meeting on 4 August 2022 with Mr Tippings-Graham and Ms Davies where he was interrogated about lateness, timekeeping, use of phone and why he kept asking Ms Davies for her phone number. This meeting cannot have taken place on 4 August 2022 as Mr Tippings-Graham was on annual leave from 2 August 2022.

46. On 4 August 2022 Ms Davies reported to HR the following:

- the claimant was still taking frequent breaks and not started work until 12pm;
- he was not listening to advise of the analyst (senior) when providing support;
- he was overdue on his compliance wire training with 38 documents due that day and 28 overdue tomorrow. The allocated time was 10 per day;
- she had asked the claimant to pick up his uniform from stores on the 28 July 2022 and 3 August 2022 and he had come to work that morning with no uniform again;
- he had been slightly late for the morning meeting this morning 08:36 on workday.

47. On 5 August 2022 Ms Davies reported to HR the following:

- The claimant had again attended in inappropriate uniform as he had left it in his car;
- He was described as late for work as had clocked in at 08:34 and not arrived at the lab until 08:37;
- PPE –the claimant was still wearing googles on top of head;
- The claimant was moving car around the site (carpark security hut, side streets, loud music) multiple times a day;
- The claimant was taking multiple breaks and she was finding it hard to know his whereabouts;
- The claimant had requested a further reduced shift on 9 August 2022 and was advised if it was not a hospital appointment then the time will need to be worked back.

48. On 5 August 2022 the claimant had a telephone consultation with Occupational health.

49. On 9 August 2022 the claimant attended a probation review meeting . Also present was Ms Davies, Ms Hill, HR Manager and Ms Escrontrias, Senior HR Manager. There was a note of this meeting in the bundle. The claimant was offered the right to be accompanied but he declined. The note stated that the claimant has bipolar disorder and the company would normally be considering terminating his employment given the level of concerns but the company *"wished to ensure he has additional support and early interventions to help him succeed in his role".*

50. The following concerns were discussed with the claimant:

- Failure to adhere to health and safety instructions;
- Time keeping and attendance;
- Conduct towards colleagues, progress in training failure to follow GMP regulatory matters; use of personal mobile phone and vaping in non smoking area including just outside the lab.

51. The claimant was set a number of objectives in a probation improvement plan. Specifically, in respect of adjusted start times, it is recorded that the claimant was expected to start on time. There are a number of references to the claimant being late when arriving before 9am so we find that there was an expectation he would still start at 8.30am albeit there would be leniency in not sanctioning him for being late.

52. On 10 August 2022 the claimant asked Ms Davies for her personal number twice despite having been advised the day before (as well as other occasions) that this was not appropriate and being given alternative means of contacting work if he was going to be late.

53. On 11 August 2022 the claimant disputed the probation meeting notes and handed in a version with annotated handwritten comments. The claimant considered he had been bombarded by issues and if he had made comments that had upset anyone they should have been raised with him at the time. He stated his mental health as **BAD** and he was desperately trying to stabilise it. He also challenged that an alternate work pattern had been implemented saying he had not heard anything about it.

54. By this point managing the claimant was impacting on Ms Davies. She reported to Ms Hill:

"I can't cope for much longer (I just don't want to be here), trying to get Benji to do what I need him to do. I know it might be a cope (sic) out. But its mentally draining, (he asked one of my analysts for work yesterday - she said she felt like he didn't want to be around me/speak to me, so she had to physically walk him to the lab). He has said multiple times that he does what he wants now his manager is gone, just killing time. He took 1 hr 30 minutes to print a protocol yesterday evening, even though he told me in the morning meeting all methods and protocols were printed and ready. (I've asked to see them and he's been gone ages). I feel like I'm constantly on his case, trying to make sure he actually does something per day as he cannot be trusted. Its effecting my ability to sit down and do

work, I feel like I can't concentrate. I've never had someone effect me like this before - not sure how to keep going."

55. Ms Hill arranged to meet with the claimant on Teams later on 11 August 2022. Mr Tippings-Graham was back from leave and also attended. They ran through all of the claimant's comments on the probation meeting notes. A note of the meeting was prepared in the form of a memo drafted by Ms Hill on 15 August 2022 but this was never sent to the claimant as events overtook (see below). This recorded that with regards to start times, the respondent had permitted the claimant to start late on Mondays (0830 instead of 8am) and been lenient with lateness on all occasions to date. It was confirmed the respondent would continue to provide reasonable flexibility towards morning start times and he would only be paid for the time he worked. The other adjustments recorded were that the claimant would be given an additional 30 days to complete his compliance wire training and he would be permitted to keep his mobile phone with him for medical telephone calls provided it was on silent and kept out of sight, alternatively he could provide Ms Davies landline to his GP. He was also referred to the company's EAP programme. A review was set to take place on 23 August 2022.

56. Also on 11 August 2022 the respondent received the occupational health report. It recommended that the claimant be given leeway and understanding reading time keeping (within reason) temporarily until he had been assessed by his GP to ensure he was on the right medication. It also recommended weekly catch ups and to release him for medical appointments as it was strongly advised the claimant needed to urgently see his GP.

57. Ms Davies continued to monitor the claimant's time keeping and performance. On 17 August 2022 the claimant arrived at 9.25am and later told Ms Davies that the 10-15 minutes leniency was not enough anymore. Ms Davies asked Mr Tippings Graham on whether she should be asking the claimant about the lateness and was told he would check with Ms Hill.

58. Ms Davies had concerns that she was finding it difficult to ensure the claimant was being adequately trained and to date he had only been trained to Technician level. Ms Hill instructed Mr Tippings-Graham to send the claimant the memo she had drafted after the 11 August 2022 meeting but for reasons that are unclear this did not happen and it was not sent prior to his dismissal (see below)

59. The claimant was absent on 18 August 2022. On 19 August 2022 a different team leader raised concerns about the claimant to HR. She reported that he had asked to leave site for an hour during the day to attend Friday prayers. He was subsequently given permission to leave site but that for health and safety reasons, he was asked to let them know in person when he was leaving site and when he was coming back. Having understood the claimant would want to attend every Friday, it was explained that he would need to work the hour in advance and on this he replied that he did not know yet as he is supposed to be going to prayer every Friday but couldn't be bothered or was too 'Lazy' (his words) sometimes. The team leader expressed a view that the claimant appeared

to be able to come and go as he please and this was going to be detrimental to him being able to complete his work and for the team leaders to provide the necessary support. Later on in the day the team leader went down to the laboratory and observed the claimant talking to several lab technicians and showing them things on his phone next to running equipment.

Events on Monday 22 August 2022

60. The Tribunal did not hear evidence from Ms Davies about her version of events. It was reported that she remained too upset about the incident to attend tribunal. There were a number of contemporaneous documents in the bundle recording her version of events. We also considered the claimant's version of events as set out in his claim and witness statement.

61. Ms Davies rolling log records that she had a discussion with the claimant about concerns over documentation from the previous week. After informing the claimant there would be no further training until he was comfortable with daily activities, the claimant seemed unhappy. Ms Davies then recorded:

''Benji seemed unhappy and proceeded to tell DD that he once run a woman over, she ended up in hospital with broken bones, it happened outside a police station and Benji was tested for alcohol and drugs it was 1am in the morning, the women went up over the bonnet and the windscreen. His friends did not believe him however, he was placed into the back of a riot van and then taken to a police car. Benji said he felt no remorse and was more interested in the damage to his car. He said he then had to look remorseful, as there were witnesses nearby. DD feels that Benji shared this story, to test DD as he made a comment saying that he knew it was not appropriate workplace conversation."

62. There was no evidence to indicate that Ms Davies immediately reported this conversation to anyone and she did not mention in the note that the claimant had appeared to check no one was listening before he made the comment.

63. The claimant's evidence about the conversation was as follows.

"After this I approached Danielle at her desk as I was unsure about some paperwork and wanted some guidance. I began explaining to her that I am now due an urgent mental health appointment from a senior and the previous Practitioner felt I needed someone that was more experienced and specialised to assist me with my mental health. I explained to DD that I am trying so hard to fight off suicidal thoughts and crippling anxiety due the constant meetings, questions and constantly being watched and interrogated and when will I finally be given fair adjustments along with additional training to ensure that I have a fair chance at my role, but these were just ignored and I was told I would not get any additional training. DD then began to say that she sympathised with me regarding my mental health and that she was my 'work mum and I could tell her anything' (this was not the first occasion that she had said that). She then began to tell me that (details not necessary to recount) *she had witnessed the severity of mental health first hand and understood what it can do to a person. At this point I felt as though for the first time DD (or any manager) had began to try to*

understand what I was going through without shutting me down and given the vulnerability I was feeling I felt as though for the first time I was shown some sort of support. I replied by saying 'PTSD is awful. I remember when I suffered from it due to a car accident involving a drunk woman and that it affected me so badly that I struggled to drive for weeks, which was hard since I love cars and driving is one of the few things I enjoy doing'. She responded to this by saying 'Gosh that must have been so hard for you, I know how much you enjoy cars as much as me and I don't know what I would do or how I would cope if I was in that position'. "

64. Also on 22 August 2022 Mr White was on a visit to the Tredegar site. He observed the claimant (at the time he did not know who the claimant was) with his lab trousers and coat sleeves rolled up and raised this with a team leader to instruct the claimant to wear his protective clothing properly.

65. On 23 August 2022 Mr White was again in the lab and noticed that Ms Davies was visibly very upset. He approached her with Ms Smith, a director and asked what was wrong. Ms Davies told Mr White that she had been discussing a work-related issue with the claimant and that he had then checked no one else was listening before saying directly to her that he had previously run someone over with his vehicle and did not feel any guilt or remorse. Ms Davies confirmed that this comment had made her feel upset and that she had felt threatened by it and the manner in which it had been said

66. Mr White and Ms Smith then called Mr Tippings-Graham into a meeting to inform him that Ms Davies was distraught and felt threatened by the claimant. Mr Tippings-Graham messaged Ms Hill and asked to speak to her urgently on Teams. He informed her that it was about the claimant and that he had told Ms Davies about a time he ran someone over with his car and also had turned up at 10am.

67. At 11.06 am Mr Tippings-Graham messaged Ms Davies on Teams and asked to see her. He must have informed her at this point that the claimant was going to be dismissed because there was a reference to her moving her car (as the claimant was parked next to it) and she also told Ms Hill at midday that *"I feel really bad that Benji is losing his job. But can't take anymore of the mental abuse. Its really not pleasant to come to work. Feel sick as Celyn just said himself and Kate will terminate today"*

68. At 11.45am, after Ms Hill said she was not available until 12, Mr Tippings-Graham advised "*we are terminating Benji, Colin*[1] *does not want him on site any longer".* Ms Hill replied that he should be aware "there was a risk of two claims" if not handled correctly.

69. Thereafter there was a Teams call with Mr Tippings-Graham, Ms Hill, Mr White and Ms Smith. Both Ms Hill and Mr Tippings-Graham understood from that conversation that Mr White was instructing them to dismiss the claimant immediately and leave site immediately being of the view the claimant had committed gross misconduct.

70. Mr White's witness statement says he agreed that he stated he considered

[1] A reference to Mr White

the conduct to be gross misconduct that could lead to instant dismissal and how this was interpreted as an instruction to dismiss the claimant but denied this had been his intention. He stated "*I had been clear that I felt that to ensure the protection of everyone involved, my overriding feeling was that PCI needed to deal with the issue immediately and that Mr Masood could not remain on the premises. I had been told that Mr Masood was in his probationary period and I consider that his actions are the type of conduct that results in immediate dismissal during the probationary period. I am aware that there is wording in PCI's employment contract which permits PCI discretion to terminate the contract during the probationary period (pg.68, 73). I also agree that if the comment was made towards* [Ms Davies] *it was enough to justify instant dismissal for gross misconduct and so I support the decision that was made to dismiss Mr Masood in that regard.* Mr White says he was not informed that the claimant was bipolar at the time he reached that decision and only became aware later after the claimant made a claim. He had met him for the very first time on 22 August 2022. We accepted Mr White's evidence that he was unaware of the claimant's bipolar at the time of the dismissal.

71. The claimant was subsequently called into a meeting with Mr Tippings-Graham and Ms. Smith. It is accepted that there was no further investigation and the claimant was not asked for his version of events. Mr Tippings-Graham's evidence was that he was not told the real reason for dismissal instead he was told it was unsatisfactory performance. The claimant says he was told by Mr Tippings Graham that his contract was being terminated with immediate effect due to an inappropriate conversation he had with Ms Davies where he had told her he *"took a woman out with my car*' and this had made her feel uncomfortable because she was a woman'. He said he was shocked by the false allegation made by Ms Davies and said there must be some mistake and that he had not meant for her to take it the wrong way it just being a conversation. He offered to apologise for the misunderstanding to which Mr Tippings-Graham advised it was out of his hands and there was nothing he could do.

72. Later after the dismissal Mr White walked the claimant to his car and says the claimant told him he had "really messed up this time" and was there anything he could do. Mr White told the claimant he could appeal. The claimant denied he had said he had messed up Mr White but agreed he said was there anything he could do as he was very confused. He also agrees Mr White told him he could appeal.

73. We accepted the account of Ms Davies as to what was said by the claimant. We noted that Ms Davies had told the claimant he would not be progressing before he had completed the appropriate training and that the claimant was likely to have been frustrated. The claimant himself says that the context of the conversation was from his point of view frustrations about his perception that adjustments were not being made and his conditions was not being understood. We also do not think it is likely that Ms Davies would have shared these personal details with the claimant or refer to herself as his work mum given her well documented concerns about the claimant overstepping boundaries and repeated requests for her personal telephone number. We also took into account the contemporaneous supporting accounts of the respondent's witnesses and the documents recording what

was said at that time.

74. Further had the respondent's intended to dismiss the claimant because of his disability it is implausible they would have set out the steps they intended to take in Ms Hill's note on 15 August 2022. Although this was not sent to the claimant as events overtook, we find that it sets out the intended steps to be taken which does not sit at all with an intention to dismiss him because of his disability. The note confirmed the respondent would continue to provide reasonable flexibility towards morning start times and he would only be paid for the time he worked. The other adjustments recorded were that the claimant would be given an additional 30 days to complete his compliance wire training and he would be permitted to keep his mobile phone with him for medical telephone calls. He was also going to be referred to the company's EAP programme and a review was set to take place on 23 August 2022.

75. Lastly, we also take into account the somewhat confused circumstances surrounding the claimant's dismissal. Mr Tippings-Graham reasonably understood that he had been instructed to dismiss the claimant by Mr White who (whilst accepting his words may have been understood to be an instruction to dismiss) did not intend for that to be the outcome. The plain and evident reason for that state of affairs was what Mr White believed to have taken place between the claimant and Ms Davies. It was not because of his disability. Ms Hill was plainly aware of the potential, risk of dismissing the claimant but her counsel was not available at the time the decision was understood to have been made. We also accept the reason the claimant was not told the true reason at the time. In short, the dismissal was a debacle but it was not discriminatory.

<u>File note Mr Tippings-Graham</u>

76. The respondent had produced a file note that was signed with a handwritten signature and date of 23 August 2022. Mr Tippings-Graham accepted that he had back dated his signature and date and that he had not actually signed it until he had typed up his handwritten notes some time later in December 2022. The handwritten notes were no longer available having been turned into a typed note. The note was of the dismissal meeting and stated that the claimant was informed the contract was being terminated due to unsatisfactory performance

77. On 30 August 2022 MS Hill sent Ms Escrontrias the following message after she enquired about the claimant:

"He continued with his inappropriate comments. He got [Ms Davies] *alone and made a point of looking over his shoulders before telling her that he has previously run someone over with his car and felt no remorse which understandably really shook her up. Such a shame but there was nothing else we could reasonably implement to support him. We had to consider the welfare of everyone else in the team and quite a few people were scared of him because of his behaviour and inappropriate comments.*

Letter of dismissal

78. There were two different versions of the letter of dismissal in the bundle. The claimant's case is that he never received any letter confirming his dismissal until he received his documents pursuant to a SAR request and at that time received the version of the letter which refers to a probationary hearing on Monday 1 August 2022 (there had been no such hearing on that date), with a termination date of 1 August 2022. The second version was disclosed as part of these proceedings and referred to a probationary hearing on Monday 23 August 2022 and a termination date of Monday 23 August 2022.

79. Mr Tippings-Graham's evidence was that he drafted the letter on 31 August 2022 using a template letter which had an incorrect date (1 August) which he then corrected to 23 August 2022. The meta data of the letter confirms it was created and printed at 09.36am on that date. He says he sent the letter first class that day. He explained that the reference to the letter being modified on 1 March 2023 could have been when it was later shared to a shared system.

80. We were invited to find that the reason for the reference to a 1 August 2022 probationary hearing was that the date the respondent first intended to dismiss him after his first 4 week review on 1 August 2022. This does not make any sense as the letter was not created until 31 August 2022 and does not reflect the respondent's position or intentions as set out in Ms Hill's draft note of 15 August 2022 (see paragraph 55). We therefore reject that contention.

81. We were also invited to find that Mr Tippings-Graham had amended the letter to change the date of dismissal to 23 August 2022 as evidenced by the incorrect reference to that being a Monday whereas it was a Tuesday. It was submitted that this was evidenced by Mr Tippings-Graham being prompted to fabricate this letter following the conversation between a Ms Hale and Ms Hill on 1 March 2023 where Ms Hale was asked for any emails or teams chats regarding the claimant running someone over and made his team leader distressed. It transpired that Ms Davies had not made the file note Ms Hill had asked her to back in the August. Ms Davies then sent an email to Ms Hale on 8 December 2022 summarising her concerns and her account of what had happened on 22 August 2022. We do not find the letter or Ms Davies rolling records were fabricated or dishonestly changed after the event. We find that the letter was printed and sent but for reasons unknown did not reach the claimant.

82. The letter stated that the claimant had a right to appeal within 7 days of receipt of the letter. We accept that the claimant did not receive the letter as we think it highly likely he, with help from his mother would have appealed had he done so.

Final salary payments

83. The claimant was dismissed on 23 August 2022. On 26 August 2022 he was paid until the end of the month (31st) so was paid a week plus one day

notice. The pay slip said PILON was zero.

Comparators

84. The claimant relies upon two comparators for his direct discrimination claim in respect of the alleged less favourable treatment of that he was repeatedly told it was not possible for him to have leniency or start the late shift.

85. The first is a Ms F. Ms F was not in the same role as the claimant. She had been initially on a 10 week placement for her masters as a post graduate student. She was later employed as a Lab Technician who are employed to support analysts. As this is a lower skilled than the Analyst role there is more room to permit greater flexibility with working hours, as there is less of a requirement to follow documented procedures and requirements, particularly where these are time sensitive. It is accepted that Ms F was permitted to work 09:30-17:30 and had flexibility to start times. The reason provided was that she had to come to work via public transport and lived an hour away, whereas the claimant drove to work and lived 10 minutes away (save on Mondays when he would sometimes travel down from Bradford).

86. The other comparator was Mr Jalil (witness for the claimant). We found Mr Jalil to be a credible witness however most of his evidence was not relevant to the issues in the claim. He was employed as a development Technician and started around the dame time as the claimant attending the same induction. He worked for two weeks on 8am – 4pm then went onto a shift pattern which varied between 6am – 12.30/14.15, 14.00 – 22.15 and 12.15 – 18.45. Mr Jalil's role involved supporting the analyst role.

The Law

Wrongful dismissal/notice pay

87. The issue for the Tribunal is to determine whether the claimant was entitled to notice pay, whether he was paid it and if not were there reasons why the notice pay could be held.

Discrimination

Direct disability discrimination pursuant to Section 13 of the Equality Act 2010 ("EA 2010")

88. In **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** held that the Tribunal must consider the reason why the less favourable treatment has occurred. Or, in every case of direct discrimination the crucial question is why the claimant received less favourable treatment.

89. The key to identifying the appropriate comparator is establishing the relevant "circumstances". In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** this was expressed as follows by Lord Scott of Foscote:

(i) *"...the comparator required for the purpose of the statutory 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."*

90. On the burden of proof Section 136 EA 2010 provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

91. In **Igen v Wong [2005] IRLR 258 (CA)** the guidance issued by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd** was approved in amended form. The Tribunal must approach the question of burden of proof in two stages.

(i) "*The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld."* (paragraph 17, per Gibson LJ)

92. **Hewage v Grampian Heath Board [2012] IRLR 870 (SC)** endorsed the guidelines in **Madarassy v Nomura International [2007] IRLR 246 (CA)** concerning what evidence is required to shift the burden of proof. Facts of a difference in treatment in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination; there must be other evidence.

<u>S15 – Disability Arising from Discrimination</u>

93. Section 15 provides:

> **(1) A person (A) discriminates against a disabled person (B) if—**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

94. **Basildon & Thurrock NHS Foundation Trust v Weerassinghe UKEAT/0397/14** provides the Tribunal should identify two separate causative steps in Section 15 claims (per Langstaff J, then the President of the EAT):

    (i) "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."

95. **Pnaiser v NHS England & anor [2016] IRLR 170** sets out the approach to be followed in Section 15 claims (paragraph 31):

1. A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
2. The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a section 15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
3. Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.
4. The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links.
5. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
6. The statutory language of section-on 15(2) makes clear that the knowledge required is of the disability only, and does not extend to a requirement of

knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

96. It does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment.

97. In respect of S15 (1) (b), the Tribunal must objectively balance whether the conduct in question is both an appropriate and reasonably necessary means of achieving the legitimate aim. In **Birtenshaw v Oldfield [2019] IRLR 946**, the EAT held that the Tribunal's consideration of that objective question should give a substantial degree of respect to the judgment of the decision-maker as to what is reasonably necessary to achieve the legitimate aim provided he has acted rationally and responsibly.

Indirect Discrimination

98. This is set out in Section 19 of the Equality Act 2010. The EHRC Code of Practice on Employment provides that the phrase 'provision criterion or practice' should be construed widely so as to include for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.

99. The PCP must be of neutral application. A PCP can be a one-off decision **(British Airways Plc v Starmer [2005] IRLR 862)**. A liberal rather than overly technical approach should be adopted when considering PCP's. However a one off flawed disciplinary procedure will not satisfy the low threshold **(Nottingham City Council v Harvey EAT 0032/12).**

100. In **Essop & Ors v Home Office (UK Border Agency) & another [2017] ICR 640** the Supreme Court identified six salient features of the definition of indirect discrimination: First, there was no express requirement for an explanation of the reasons why a particular PCP put one group at a disadvantage when compared with others. Second, whilst direct discrimination expressly required a causal link between the less favourable treatment and the protected characteristic, indirect discrimination did not. Instead, it required a causal link between the PCP and the particular disadvantage suffered by the group and the individual. Third, the reasons why one group might find it harder to comply with the PCP than others were many and various. The reason for the disadvantage did not need to be unlawful in itself or be under the control of the employer or provider. Both the PCP and the reason for the disadvantage were 'but for' causes of the disadvantage: removing one or the other would solve the problem. Fourth, there was no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage. Fifth, it was commonplace for the disparate impact, or particular disadvantage, to be established on the basis of statistical evidence. Sixth, it was always open to the respondent to show that his

PCP was justified. There was no finding of unlawful discrimination until all four elements of the definition in s 19(2) were met. The essential element was a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual.

S20/21 – Failure to make reasonable adjustments

101. Sections 20 and 21 of the Equality Act 2010 set out the duty to make reasonable adjustments. The Tribunal must consider first of all the PCP applied by the employer, secondly the identity of non-disabled comparators (where appropriate) and thirdly the nature and extent of the substantial disadvantage suffered by the Claimant. (**Environment Agency v Rowan 2008 ICR 218, EAT).**

S 26 EQA 2010 – Harassment

102. Part 7 of the EHRC Code provides that 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.

103. It is a question of fact for the Tribunal as to whether the conduct complained of occurred. If so, the Tribunal must determine if it had the purpose or effect as set out in S26 (1) (b). The test has subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser has on the Claimant. The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

104. In **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495** the EAT held that the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the only necessary or possible route to the conclusion that the conduct in question is related to the particular characteristic. Nevertheless there must still be some feature or features of the factual matrix identified by the Tribunal which properly leads it to the conclusion that the conduct is related to the protected characteristic. The Tribunal must articulate what these features are.

105. **General Municipal and Boilermakers Union v** Henderson 2015 IRLR 451, is authority that held where a single comment could not constitute harassment because it had not reached the necessary degree of seriousness.

Disability – Knowledge

106. This is a question of fact for the Tribunal. The burden is on the employer to show it was unreasonable to have the required knowledge.

107. The EHRC Employment Code provides that employers must do all they can reasonably be expected to do to find out whether a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers

should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

108. S15 (2) provides that the discrimination will not arise if A shows they did not know and could not reasonably be expected to know that B had a disability.

109. In respect of reasonable adjustment claims, an additional element of knowledge is required. The first element is the same test as in S15 namely that A shows they do not know or could be reasonably be expected to know that the disabled person has a disability. Schedule 8 EQA 2010 pt. 3 para 20 states that A is not subject to the duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at a disadvantage. Accordingly, the additional element on knowledge for S20/21 claims is that A must also be reasonably expected to know the disabled person is likely to be placed at the disadvantage.

Conclusions

Wrongful dismissal claim

110. The claimant was entitled to one week's notice pay during his probationary period (see paragraph 18 (ii)). The effective date of termination was 23 August 2022 and he was paid in full until 31 August 2022. Whilst the notice pay may not been labelled as such in the pay slip, the claimant was paid one week and one day from the effective date of termination. The notice pay claim therefore fails.

Direct discrimination

Deliberately isolated the claimant from his team/colleagues/managers, in that he had no access to Teams, no lanyard for the first few weeks, and no remote online access;

111. See findings of fact at paragraphs 23, 25, 26, 27 and 28.

112. The claimant was not deliberately isolated in the manner alleged. The delays in providing the claimant with access to the systems was no more than usual on boarding processes within employment as can be seen the same delay was experienced by Mr Jalil. We saw that a request had been logged with IT to resolve issues. He had full access to the systems required to undertake his training and perform his role and was given information about how to contact managers on multiple occasions. The claimant has not established there was less favourable treatment. Further the respondent did not have knowledge of the claimant's disability until 26 July 2022 so this cannot have been the reason why there were minor delays in providing access to these systems.

113. The claimant was not entitled to remote online access as he was in probation. This was not because of his disability. This complaint fails.

Told the claimant repeatedly that it was not possible for him to have leniency

or start the late shift

114. Leniency. We have concluded that factually this claim fails. The claimant was provided with leniency throughout the short period of employment with regards to his timekeeping (see paragraphs 39 and 51). He was not subjected to any sanctions. Whilst it is correct that the respondent continued to monitor his lateness this was an entirely reasonable action for an employer to take. The claimant has not established there was less favourable treatment. The comparators were not appropriate comparators as their circumstances were materially different. They were in different roles requiring less supervised intensive training.

115. It is accepted the claimant was not permitted to start the late shift. The reason the claimant was not permitted to go onto the late shift was that he was in training on a probationary period and needed to be in the lab during core office hours so as to ensure he was receiving adequate training support from managers. This claim fails.

Failed to pay the claimant 3.5 days of sick pay

116. We were unable to understand the basis of this claim. The claimant was paid in full throughout the duration of his employment. It is not factually made out and fails.

Require the claimant to call reception when he had to call in for lateness / sickness, who did not start until 8.30am and not provided with any other information or contact details for anyone else.

117. See findings of fact at paragraphs 23, 37, 38, 39, 40, 49, 50-51. The claimant was required to report sickness absence to his employer. He was provided with the number for reception, his manager's landline number and the number for HR. the fact that reception did not start until 8.30am was irrelevant as the claimant was not required to call before 8.30am. He was not subjected to any detriment for failing to report his absence despite arriving late on numerous occasions not having telephoned in. the same can be said for not following procedures when off sick. The claimant has not established less favourable treatment. The reason the claimant was required to call in sick was so that the respondent could monitor attendance not because of his disability. This claim fails.

Dismissed the claimant

118. See findings of fact at paragraphs 60-75. The reason the claimant was dismissed was because of Mr White's belief about the comments he made to Ms Davies on 22 August 2022. Mr White was not even aware that the claimant was disabled at the time he reached his decision and therefore the reason why the claimant was dismissed was not because of his disability. This complaint is not well founded.

Discrimination arising from disability claim (Equality Act 2010 section 15)

119. The unfavourable treatment relied upon was dismissal and the "something arising" was the claimant's timekeeping. Having found that the

reason for the claimant's dismissal was what he said to Ms Davies on 22 August 2022 this claim simply must fail as he was not dismissed for something arising from his disability.

120. It may have been a different outcome if the something arising was for example said to have been a tendency to say inappropriate things. But this was not the case advanced by the claimant who was ably represented by his mother. Further, the claimant denied that he had said those things to Ms Davies. Given we found he did say those things and that was the reason for the unfavourable treatment, this claim fails.

Indirect discrimination claim (Equality Act 2010 section 19)

First PCP - Not providing access to employee handbook and policies;

121. See findings at paragraph 18-20. This claim is not factually made out. The respondent did not apply this PCP to the claimant. This compliant therefore fails.

Second PCP - Only informing employees about break times orally

122. See findings at paragraph 18 (ii). This claim is not factually made out. The respondent did not apply this PCP to the claimant. This compliant therefore fails.

Third PCP - Only allowing 2 x 10 minute breaks and 1 x 30 minute lunch break;

123. The respondent accepted that this PCP applied to certain contracts of employment including the claimants. The disadvantage relied upon was that the lack of flexibility to the breaks exacerbated the symptoms of the Claimant's disabilities. We accept in principle that lack of flexibility around breaks would have disadvantaged someone with the claimant's disability. However the disadvantage did not arise as the claimant was provided with significant flexibility around break times being permitted effectively to take breaks as and when he required (see paragraphs 31, 37, 47-47, 59). This complaint therefore fails.

Fourth PCP - Not providing absence / self-certification forms not providing contact with employer and not providing sick pay;

124. See findings at paragraph 23. This claim is not factually made out. The respondent did not apply this PCP to the claimant. This compliant therefore fails.

Fifth PCP - Not providing return to work well being discussions on return of sickness absences

125. See findings of fact at paragraph 30. The respondent failed to conduct return to work interviews with the claimant. This was a wholescale omission at the Tredegar site at the time and as such applied to persons without a disability also.

126. The disadvantage replied upon was that the claimant's health and wellbeing was not checked on his return to work and no management plan was put in place.

127. Although no return to work interview was conducted, we do not agree that his health and well being were not checked on his return. See our findings at paragraphs 30, 34, 35, 37-43, 46-49, 51, 55 and 59 of the steps taken to check on the claimant's welfare. Therefore we find the claimant was not put to the disadvantage. With regards to no management plan being put in place this was not the case. The claimant did have a management plan which was discussed and documented (see paragraphs 49, 51-55). The respondent also sought advice from occupational health. The claimant has not shown he was put to a disadvantage by the failure to conduct a return to work interview.

Reasonable Adjustments complaint (Equality Act 2010 sections 20 & 21)

128. It is accepted that the respondent knew about the claimant's impairment from 22 July 2022.

First PCP - Requiring employees to commence an induction programme at 8.30am and Fourth PCP Requiring employees to attend work on time;

129. The substantial disadvantage relied upon was:

"Work start times - Lacked sleep and suffered from High levels of insomnia would have prevented a bipolar individual from mustering the energy to achieve the work start times. This would be compounded as the days went on. When a bipolar individual does finally drift off, consider it like a coma. Where an individual would be completely oblivious to their surroundings and time. So it would be very easy for a bipolar individual to miss work start times on a regular basis."

130. We accept that the claimant's bipolar put him to a disadvantage when it came to adhering to an 8.30am start time. The claimant suggested the respondent could have adjusted his start times and permitted him to work a late shift to avoid the disadvantage.

131. Firstly, the respondent did not know about this disadvantage nor could they have reasonable bene expected to know until they received the occupational health report on or around 11 August 2022. Whilst the claimant had told Ms Davies on 22 July 2022 that he had problems sleeping and getting up at 6am we did not consider this was sufficient to have fixed the respondent with knowledge of the disadvantage at this point in time. In our judgment this knowledge was not imparted until receipt of the occupational health report on 11 August 2022.

132. The claimant was provided with leniency in starting late and not having to make up time when he had arrived late, but his shift start times were not formally adjusted. There was knowledge of the disadvantage from 11 August to 19 August 2022 a period of just over one week. The claimant

was consistently late for work and was not sanctioned or disciplined. He was consistently missing the morning team meetings that took place at 8am on Mondays and 8.30 am every other day. It was evident that the claimant was finding it difficult to arrive on time to work and towards the end of his employment began arriving later and later during a period where he was plainly struggling with his bipolar.

133. On 17 August 2022 the claimant told Mr Tippings-Graham that the 10-15 minutes leeway was no longer enough. He was only then in work for two further working days (19 and 22 August 2022) before he was dismissed. We did not hear any specific explanation as to why the claimant's start time could not have been adjusted say to 9.30am albeit we note that he would miss the morning team meetings. However the claimant was also struggling in the afternoons. The intention was to provide the claimant an additional 30 days to complete the training which he had fallen behind on. Taking into account the adjustments that were implemented and considering the relatively short period in which the claimant's shift start times were not adjusted the respondent has not failed to make reasonable adjustments regarding the shift start times.

134. In our judgment, it would not have been a reasonable adjustment to permit the claimant to work on the late shift as he was on probation and in a structured induction programme which required him to work the core hours to ensure his training needs were met and the respondent's standards maintained.

Second PCP - Assuming that OH appointments last 45 minutes;

135. The Tribunal was unable to understand this as amounting to a PCP. This appears to have been a complaint about taking the claimant to task for taking a break after the OH appointment on 26 July 2022. This is about a specific matter or event that happened to the claimant and is not capable of amounting to a PCP. Further, there is no discernible substantial disadvantage. The respondent would be perfectly entitled to question the whereabouts of their employees who are not in work when they are being paid to work. This complaint therefore fails.

Third PCP - a requirement to wear uniform

136. It was accepted that the respondent applied this PCP. Their employees who worked in the lab environment needed to wear a uniform (including goggles) for health and safety reasons. This is an entirely legitimate and reasonable provision. The suggested disadvantage is that someone with bipolar may have difficulty remembering a set uniform or wearing it correctly. The claimant was permitted to wear his own trousers on the frequent occasions he forgot his uniform. He was not however permitted to wear the trousers with the legs rolled up for health and safety reasons. The claimant accepted that rolling up his trousers had nothing to do with his disability. There was no evidence that the claimant's bipolar disorder might mean that he would wear his safety googles on his head rather than over his eyes. Further, in our judgment it would not be a reasonable steps for the uniform policy to be adjusted so as to permit the claimant to wear the safety apparatus in the way the claimant was frequently

observed. This complaint is not well founded.

Fifth PCP - requiring employees to take fixed, regular breaks;

137. This complaint fails for the same reasons set out in paragraph 123 above.

Sixth PCP - Not permitting employees to use personal mobile phones at work.

138. The respondent applied a PCP of not permitting employees to use a mobile phone in the lab environment for reasons of health and safety and trade secrets. Reasonable adjustments were provided in that the claimant was permitted to have his phone on him to take medical calls as well as use of the landline in the lab. Unfortunately the claimant abused this adjustment by using this phone outside of the permitted adjustment purposes. Even so, the claimant was not put to any disadvantages by this PCP. This complaint is not well founded.

Seventh PCP - Paying SSP until an employee reaches three month's service

139. This PCP was not applied to the claimant and therefore no disadvantage has been shown.

Harassment related to disability (Equality Act 2010 section 26)

The following conduct was relied upon as harassment:

a. Constantly question the claimant as to his lateness;
b. The manner in which the performance review on 9/8/22 was conducted;
c. Challenged the claimant on not wearing his uniform (trousers);
d. asked why the claimant checked his phone 3 times in one day
e. set the claimant a target of no more lateness;
f. challenge the claimant on eye rolling;
g. challenge the claimant about laughing;
h. asking the claimant why he was asking his line manager for her number;
i. 10/8/22 pressurise the claimant into signing notes of the meeting on 9/8/22;
j. Being asked where the claimant was when he attended an OH appointment;
k. Being questioned as to the length of an OH appointment;
l. Being challenged as to the reason for taking breaks.

140. It is proportionate to discuss allegations c, d, f, g, h, j, k and l together as these acts were not in dispute. The respondent did do these things. These things did not relate to the claimant's disability. These challenges or questions related to the claimant's conduct in the workplace and the respondent was entitled to challenge or ask the claimant about this conduct / behaviour. We agree with the respondent's submissions that these enquiries were ordinary, routine enquiries for management to pose when an employee is routinely late, taking longer and more regular breaks than contractually permitted, and not attending meetings on time. Objectively, it is not reasonable for this conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him. These complaints therefore fail.

Questioning the claimant about his lateness and setting a target of no more lateness

141. The respondent gave the claimant mixed messages about time keeping. The claimant was told there would be leniency with lateness but there was still an expectation he would start on time and this was reiterated by Ms Hill at the review meeting on 9 August 2022. The respondent's expectations about time keeping should have been made clearer and set out in writing sooner to avoid any subsequent confusion. Whilst we found that Ms Davies continued to record the claimant's lateness after the leniency approach was agreed, the claimant would not have known about this at the time as this was all in documents and communications that were not shared with the claimant. We saw that on 17 August 2022 for example, the claimant arrived at work almost an hour late and Ms Davies asked HR whether she should even raise this with the claimant. This does not sit comfortably with an allegation that the claimant was being constantly harassed about his lateness. Nonetheless the claimant's timekeeping was raised with him during the short period of his employment as he was consistently being late. On balance having regard to the very short period during which the claimant's lateness was raised with him as well as Ms Hill's recorded intention to continue to allow leniency for lateness we have concluded that it was not reasonable for this conduct to have amounted to harassment.

The manner in which the performance review on 9/8/22 was conducted and on 10/8/22 pressurise the claimant into signing notes of the meeting on 9/8/22;

142. See findings of fact at paragraphs 49-50. Whilst the presence of three managers at the meeting on 9 August 2022 could be somewhat heavy handed, we do not consider that there was any conduct at this meeting that could amount to unwanted conduct relating to the claimant's disability. The meeting was an attempt to understand the claimant's issues and agree ways in which he could be supported. The respondent was entitled to raise those matters with the claimant at that meeting. There is no evidence to suggest the claimant was pressured into signing the notes. The claimant was permitted to make comments and did so.

_____

Employment Judge S Moore
Date 7 May 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 9 May 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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