Case No: 2304067/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mr. K. Aderibigbe-Suckoo**

Respondent: **Dexters London Limited**

Held at: **London South Employment Tribunal**

On: **10 - 13 June 2024**

Before: **Employment Judge Burge**
Ms P Keating

Representation
Claimant: In person
Respondent: Ms L Badham, Counsel

JUDGMENT having been delivered orally on 13 June 2024 and written reasons having been requested by the Claimant at the hearing, in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant worked for the Respondent from May 2021 until 31 December 2022 and claims direct disability discrimination, harassment and a failure to make reasonable adjustments.

The hearing

2. The Claimant was in pain with his back. The hearing was adjusted to enable him to move around, stand up sit down, take medication and take breaks. The hearing day also started and finished earlier with longer breaks to take into account the Claimant's medication schedule.

3. Tribunal members attended the hearing by video link. Initially everyone else was in person, on day two Ms Badham requested to attend by video

link failing which she would make an application for an adjournment for the day due to a domestic emergency. The Claimant requested that he too be allowed to attend remotely to help with his back pain, following which the hearing was converted to a remote hearing.

4. After closing submissions, but before deliberations had commenced on the third afternoon of the hearing, the Tribunal discovered that the two Tribunal Members, Mr Taj and Ms Keating were from the same panel. The parties were informed, were told which panel the members were from, and given the choice between a rehearing with a newly constituted panel, or to continue with one member and the Judge. They could also make any other suggestions. Both parties elected to continue with the Judge and one member. The Judge tossed a coin, and Mr Taj was released with Ms Keating remaining as the Tribunal member. The parties provided written consent to the Tribunal.

The evidence

5. The Claimant gave evidence on his own behalf.

6. John Ramirez (Managing Director) and Emma Welford (Director, People) gave evidence on behalf of the Respondent.

7. The Tribunal was referred during the hearing to documents in a hearing bundle of 255 pages. An additional email was produced by the Claimant on the second day and it was allowed into evidence.

8. Both the Claimant and Ms Badham provided skeleton arguments and gave closing oral submissions.

Issues for the Tribunal to decide

9. The Claimant is disabled by virtue of prolapsed intervertebral discs, this was decided by EJ Rea at a Preliminary Hearing on 11 August 2023. The issues were agreed at a Preliminary Hearing before EJ Sudra on 14 June 2023, harassment being added at the hearing before EJ Rea on 11 August 2023. The Issues were discussed at the start of the hearing and agreed to be:

    1) Direct Disability Discrimination (Equality Act 2010 section 13)

        The Claimant's disability is: Prolapsed intervertebral discs.

            a) Did the Respondent do the following things:

                (i) In early February 2022 the Respondent delaying in informing the Claimant about using his own desk and said he could not use it without a doctor's note;

                (ii) Insisting on the Claimant undergoing an independent assessment even though he had provided a doctor's note;

                (iii) Placing the Claimant on sick leave in or around May 2022

(iv) Disregarding the recommendations of Posturite which were made in a report, at the end of July 2022, in respect of an automatic desk.

(b) Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

c) The Claimant says he was treated worse than:
   (i) Philip Aegis; and
   (ii) a hypothetical comparator.

d) If so, was it because of disability?

2) Harassment related to disability (Equality Act 2010 section 26)

a) Did the Respondent do the following
   (i) On 22 September 2022, John Ramirez advising the Claimant that '*[his] disability doesn't work from a commercial perspective*';

   (ii) On 7 November 2022, John Ramirez advising the Claimant that '*[his] disability doesn't work from a commercial perspective*';

   (iii) On 10 November 2022, Duncan Gibb advising the Claimant that '*[his] disability doesn't work from a commercial perspective*'.

b) If so, was that unwanted conduct?

c) Did it relate to disability?

d) 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?

e) 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.

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

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

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

(i) To get any correspondence from a GP or osteopath confirmed by an independent assessor.

c) Did the PCP put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that it delayed the Claimant in not having the necessary tools to be able to work.

d) Did the lack of an auxiliary aid, namely an automatic desk, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he could not work without it?

e) Did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

f) What steps could have been taken to avoid the disadvantage? The Claimant suggests:

(i) allowing him to bring his own desk to work.

g) Was it reasonable for the Respondent to have to take those steps?

h) Did the Respondent fail to take those steps?

4) Remedy for Discrimination (to be decided once liability was decided)

a) Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

b) What financial losses has the discrimination caused the Claimant?

c) Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

d) If not, for what period of loss should the Claimant be compensated?

e) What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

f) Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

g) Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?

h) Should interest be awarded? How much?

10. The Claimant withdrew his complaints of holiday pay under the working time regulations and his complaints of unlawful deductions from wages. He said

that his complaint was that he had been put on sick leave and this was disability discrimination, that as a remedy he should be awarded full pay and commission. This complaint is brought under 1)(iii) above. In relation to holiday pay, he said that it was an act of discrimination that he had been made to take holiday. This was not in his claim form nor in the List of Issues. The Claimant said he did not wish to make an application to amend his claim.

Findings of Fact

11. The Tribunal finds that, on the balance of probabilities, the following facts occurred.

12. The Claimant was employed by the Respondent as a full time Sales Consultant from 5 May 2021.

13. The Claimant's line manager was George Evans. They often messaged each other. It can be seen in the messages between them that they often messaged about work related matters. On 6 January 2022 the Claimant messaged Mr Evans to say "Need to talk to you about my back when you get a chance". Mr Evans replied "No problem mate… speak tomorrow?" with the Claimant replying "Yeah that's cool".

14. The Claimant, Mr Evans and another employee called Kieran had bad backs.

15. The Claimant provided evidence to the Tribunal, that is accepted, that he had physiotherapy appointments for his back during the first half of 2022. He also had medical appointments including some trips to A&E. However, the Tribunal also finds that the Claimant did not provide documentation relating to these appointments until preparing for this litigation. The first medical documentation he provided to the Respondent was a doctors note on 30 June 2022.

16. Mr Evans did not give evidence to the Tribunal. The Tribunal finds as a fact that Mr Evans knew about the earlier physiotherapy appointments as they were in work time, but that he did not let anyone else at the Respondent know. The reason why we have found this is because later he messages the Claimant saying he did not tell HR that the Claimant was off sick so he would not go onto statutory sick pay. Further, the Tribunal accepts Ms Welford's evidence to the Tribunal that managers are not trained on disabilities or health issues, instead they are told they should raise the issue with the board directors.

17. The Tribunal accepts the evidence of Mr Ramirez that on or around 11 May the Claimant requested a facilities assessment. This took place on 13 May 2022 and recommended a cushion, which was provided.

18. On 20 May 2022 Mr Evans asked the Claimant how his back was and he replied that it was the same but he had medication and could drive on them. He said that he had to do another MRI and more physio next week but he would be back on Monday.

19. The Tribunal finds that the Claimant was off sick from 6 May – 30 June 2022. Part of this was sick leave but the Claimant welcomed the opportunity to alter some of it to annual leave so that he could get holiday pay (email dated 1 July 2022 and reply, see below).

20. On 22 June 2022 the Claimant said he had the doctors the following day and they would get him a fit to work note with recommendations that would be needed. Mr Evans replied that once he had it sorted he should send it to him and he could have facilities get everything sorted and it will be good to have him back.

21. On 23 June 2022 the Claimant said he had been to the doctors and had been referred again and he would not have a fit note to work until 29th as that was the next available appointment.

22. On 23 June 2022 the Claimant said that he would not be seeing the pain specialist until October so "we're going to need to get the equipment for me to return". Mr Evans asked whether the doctors note would state what changes facilities need to make to his desk and the Claimant replied that "no [it] just advises that for me to come to work [he] will need changes made to the environment".

23. On 24 June 2022 Mr Evans asked whether the doctors would provide something in writing advising the changes so that he could get facilities to sort it for the Claimant's return.

24. On 30 June 2022 the Claimant provided his first doctors certificate. The condition was "ongoing back pains related to prolapsed intervertebral disc". The doctor indicated that the Claimant may be fit for work taking account of a phased return, amended duties, altered hours and workplace adaptions. The doctor wrote "allow elevated working station and shorter working hours whilst recovering". This would be the case from 29/06/2022 to 31/07/2022.

25. Upon receipt Mr Evans said he would get it straight on to facilities and asked whether the Claimant would return now or at the end of July to which the Claimant replied that he would come back now on reduced capacity to ease himself back in.

26. On 1 July 2022 Mr Evans wrote to the Claimant that he

> "*had been battling with HR. Jk and I didn't want to tell them you've been off because you'd go on stat sick pay and I didn't want that to happen. They said you should be on SSP for the whole time, but I have got them to agree to 2 weeks being paid holiday, 2 weeks paid and 2 weeks SSP, so the next paycheck might be a bit lower on the salary, although we've started to bank quite* a bit - you've already got *£3100 in Comms banked for July payslip, with more to come."*

27. The Claimant replied "Cool thanks for looking after me".

28. On 5 July 2022 the Claimant and Mr Child agreed that Posturite, an external work place assessment company, would be engaged to provide an assessment of the Claimant's work station.

29. On 8 July 2022 the Claimant requested an update on his desk. Mr Evans replied "Frustrating[ly] no, have just chased Ben who said he will chase the people team again about this visit" and that the Claimant would have to be in for the visit to which the Claimant replied "cool let me know when you need me to come in…".

30. On 13 July 2022 Mr Evans asked "Do you want to keep your booked holiday 16th to 23rd November or cancel that and be paid 16 days holiday instead of 10 days holiday?" The Claimant replied "Cancel it use holiday days if I go away later in the year can I do unpaid leave? Mr Evans replied "Not sure because you've had 7 weeks off".

31. On 15 July 2022 the Claimant asked Mr Evans if he had heard from facilities yet and Mr Evans replied that he was "still chasing".

32. On 25 July 2022 the Claimant raised a grievance:

> *"I made my colleagues aware of my pain in October 2021 . I also had constant trips to A&E throughout the year, as my symptoms were concerning and potentially life- threatening.*
>
> *I have correspondence from me to the team about the reasons why I was in the hospital and their acknowledgement of my disability.*
>
> *Throughout the issues with my back. An elevated workstation has been recommended by 6 specialists now.*
>
> *I have told my boss and I have also informed facilities that a standing desk or elevated workstation is needed for me to come back to work.*
>
> *The reason why the initial visit to the office took place was because I requested a standing desk or a device like they have in the Clapham office, this was in May 2022.*
>
> *At that time I also told you I have access to a standing desk.*
>
> *On the 30th of June 2022, Kieran McLean also informed you he had access to a standing desk.*
>
> *As such I have been unable to work and add to my pipeline and commission.*
> *Therefore I would like pay backdated for the last month and to be taken of SSP until a standing desk is installed.*
> *…*
> *The adjustments which I consider you have failed to make are letting me use my standing desk or arranging for a standing desk or keeping in communication the reason why there was a delay."*

33. The Tribunal finds as a fact that the Claimant requests a standing desk in this grievance, he does not specify it must be electric. The Tribunal also finds as a fact that the Claimant first requested a standing desk in May 2022 as this is what he says in his grievance email and his memory is likely to

have been more accurate at that time than almost two years later in the Tribunal.

34. The Claimant met with the specialist from Posturite on 27 July 2022.

35. On or soon after 27 July 2022 Posturite produced a report. It recommended a specialist chair, a telephone headset and an electric sit/stand desk. The Claimant asked for this report on 4 August 2022 but this was refused by Mr King who said:

> *"We don't share these reports as they are for employer guidance but we want to reassure you we have followed Posturites advice and are providing the equipment you have requested".*

36. The Posturite report was later provided by Mr Ramirez following advice from Ms Welford to the Claimant on 22 September when he requested it again.

37. From 28 July 2022 the Claimant worked a phased return that had been agreed with Mr Ramirez. A four week phased return was agreed as follows:

Week 1: 10am - 3pm
Week 2: 9.30am - 4pm
Week 3: 9 am- 5.30pm
Week 4: 8.30am - 7pm
Second Saturday 9am - 5pm

38. The Claimant worked those adjusted hours.

39. On 9 August 2022 the manual sit/stand desk and chair were delivered.

40. On 12 August 2022 Mr Ramirez emailed the Claimant setting out an adjustment to the Claimant's work whereby all team members would conduct the viewings that he booked and in return the deal and commission would be split 50-50. Mr Ramirez hoped that this "create[ed] a situation where [he] could generate as much new business and build [his] pipeline as quickly as possible without putting [his] back at further risk of injury".

41. On 25 August 2022 the Claimant was told his electric desk would arrive on Wednesday and that it would be put together following which the Claimant could return on 2 September.

42. On 29 August 2022 the Claimant emailed that he had been in hospital at the weekend. On 31 August 2022 he provided more information that he had been in hospital for a couple of days, that he had been advised that private treatment may not help him so he had decided just to continue to rest and wait until October before he would start seeing any real improvement.

43. On 6 September 2022 the Claimant had an assessment for the Occupational Health referral.

44. The Claimant continued working in September on reduced hours. During this time he requested a different phone and headset and these were provided on 20 September 2022.

45. On 21 September 2022 the Claimant emailed to say that he would be working an hour a day "as advised by my GP and osteopath". On 22 September 2022 the Claimant and Mr Ramirez spoke. The evidence of Mr Ramirez is accepted that he told the Claimant that a phased return of one hour a day does not work for the Respondent from a commercial perspective. Mr Ramirez emailed the Claimant and asked for him to consent to an independent Occupational Health referral, which the Claimant did do.

46. On 5 October 2024 a welfare meeting was held. The Respondent requested medical evidence and the parties agreed for the Claimant to be referred to Occupational Health.

47. The Claimant provided a further fit note lasting until 22 December 2022 advising the need for a phased return (no hours specified), a desk and chair. On 5 October 2022 the Claimant's osteopath provided an email for him to forward to the Respondent, which he did the following day. It recommended that the Claimant restarted work for an hour a day as soon as possible.

48. On 11 October 2022 Mr Ramirez sent an email to the Claimant agreeing that he could return to work for one hour a day with suggestions for which hour this would be. They agreed which hour and arranged for the return the next day.

49. On 15 October 2022 the Claimant provided his consent for the OH report to be shared with the Respondent but asked for it to be noted that the OH advice "goes in direct opposition to my medical advice and may put my health at risk".

50. Occupational Health produced their report, dated 19 October 2022:

> *"…In my professional opinion, in my 51 years of nursing, I have never recommended someone work 1 hour a day during a phased return, even if they had been off due to cancer treatment. It is usual to commence with 3-4 hours on 3-5 days a week, depending on the reason for the absence.*
>
> *I discussed my recommendations with Kadeem as in my professional opinion, with the specialised equipment which has been provided for him and the lack of nerve impingement shown on the MRI scan, he should be fit to work 3 hours a day 3 times a week with a view to gradually increase the hours over 4-5 weeks, if his condition allows. However, Kadeem was adamant he would be taking the advice of his Chiropractor and only work 1 hour a day, as he was dealing with him on a regular basis.*
>
> *Kadeem has stated under no circumstances is he willing to take any other advice other than that given by his Osteopath, to only work one hour per day initially during a phased return. This is despite the fact he has been told by management this is not commercially viable.*

You have already provided an electric height adjustable desk, an ergonomic chair and a headset, which was all the equipment recommended by Posturite following their workplace assessment.

There are therefore no further adjustments I can suggest which will enable Kadeem to return to work doing a phased return on hours which would be acceptable to management, unless he is willing to take Occupational Health advice regarding a phased return to work plan."

51. The Claimant gradually increased his working hours. On 30 October 2022 he wrote "my medical professional thinks I should keep to 3 hours. I wanted to see how the weekend went but I would like to try 4 hours starting tomorrow".

52. On 4 November 2022 a meeting took place with the Claimant and Mr Ramirez. At that meeting Mr Ramirez said that the Claimant's hours would increase to 8.30- 4pm the following week. The Claimant did not think they should and when he arrived at 10 they had a disagreement and either the Claimant left the office or Mr Ramirez told him to leave. Either way, Mr Ramirez expected the Claimant to work 8.30 – 4 and the Claimant maintained that he should keep working 4 hours per day.

53. On 5 November 2022 the Claimant raised a grievance and on 10 November 2022 a grievance hearing took place, the Claimant leaving before its conclusion.

54. The Grievance response dated 17 November 2022 said, in summary, that:

1) The GP note did not specify hours of return and the Occupational Report did not support a one hour a day return that had been recommended by his osteopath
2) The only four pieces of medical information they had from him to date was:
"● GP fit note 29th June to 31st July 2022 suggesting phased return and altered hours, elevated work station.
● GP fit note 6th October – 22nd December, stating you would benefit from a phased return to work and a standing desk, headset and ergonomic chair
● On 14th September 2022 you sent us a hospital discharge note dated 15 February 2022 when we requested further medical documentation.
● You then sent us an email from your Osteopath on 6th October 2022 when we requested written documentation."

3) Having regard to business need and medical information they upheld the 8.30 – 4 adjustment and that this was a reasonable management instruction.
4) It was company policy to pro-rate pay, commission and car allowance in accordance with hours worked, he had been paid full pay in error when he was off sick earlier in the year.

55. On 18 November 2022 the Claimant appealed the grievance decision.

56. On 22 November 2022 the Claimant resigned. He was placed on garden leave until his employment terminated on 31 December 2022.

57. The Claimant started work at another Estate Agency on 6 January 2023, he worked full time.

58. Early conciliation had started on 29 September 2022 and ended on 10 November 2022. The claim form was presented on 10 November 2022.

The law

Discrimination

59. Section 6 of the Equality Act 2010 ("EqA") provides that disability is a protected characteristic.

60. S.39(2) EqA prohibits an employer from discriminating against one of its employees by subjecting the employee to a detriment.

61. S.136 of the EqA sets out 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…"*

62. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage v Grampian Health Board* [2012] IRLR 870, SC).

63. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

64. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

65. This approach was approved in *Hewage v Grampian Health Board* [2012] UKSC 37 and in *Royal Mail Group Ltd v Efobi* [2021] ICR 1263.

66. Where there is a difference of treatment and a difference of status it does not take much more to shift the burden of proof. In *Deman v Commission for Equality and Human Rights Commission & others* [2010] EWCA Civ 1279, Sedley LJ held:

> *"We agree with both counsel that the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."*

67. Case law recognises that very little discrimination today is overt or even deliberate. Witnesses can be unconsciously prejudiced.

Direct discrimination

68. Under s.13(1) of the EqA direct discrimination takes place where a person treats the claimant less favourably because of a protected characteristic than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

69. It is often appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of disabilty. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

70. In *London Borough of Islington v Ladele (Liberty intervening)* 2009 ICR 387, EAT, Mr Justice Elias (then President) confirmed the principal in *Shamoon* and said that a strict reliance on the comparator test can be positively misleading where the protected characteristic contributes to, but is not the sole or principal reason for, the employer's act or decision.

71. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL.

Harassment

72. Section 26 EqA provides:

> *"(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."

73. In *Hartley v Foreign and Commonwealth Office Services* 2016 UKEAT/0033/15/LA, the Employment Appeal Tribunal stated that the alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive and that:

> "[23] *The question posed by s.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… the Equality Code says (paragraph 7.9):*
>
> > *7.9 Unwanted conducted "related to" a protected characteristic has a broad meaning such that the conduct does not have to be because of the protected characteristic …"*

74. *Warby v Wunda Group plc* EAT 0434/11 stated that the context in which unwanted conduct takes place is an important factor in determining whether it is related to a relevant protected characteristic.

75. In *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495 HHJ Auerbach gave further guidance:

> "[21]… whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.
>
> [25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

Reasonable adjustments

76. Section 20(3) EqA 2010 provides:

> *"…where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage."*

77. Section 20(5) EqA 2010 provides:

> *"…where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, [there is a requirement] to take such steps as it is reasonable to have to take to provide the auxiliary aid."*

78. "Substantial" is defined at section 212(1) EqA 2010 to mean "more than minor or trivial".

79. Section 23 EqA does not apply to section 20. It must be a disadvantage which is linked to the disability, that is the purpose of the comparison required by section 20. However, it is not really a causation question. Simler P said in *Sheikholeslami v University of Edinburgh* [2018] IRLR 1090 that:

> *"The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question. For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances…The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability.*
>
> *Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."*

80. An employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question (per paragraph 20(1) Schedule 8, EA 2010)

81. General guidance as to the overall approach to reasonable adjustments was given in *Environment Agency v Rowan* [2008] ICR 218:

- The PCP must be identified;
- The identity of the non-disabled comparators must be identified (where appropriate);
- The nature and extent of the substantial disadvantage suffered by the Claimant must be identified;
- The reasonableness of the adjustment claimed must be analysed.

82. The duty does not arise however unless the employer knows or ought reasonably to know that the employee is disabled *and* that the PCP put him

at a substantial disadvantage. The EHRC *Code of Practice on Employment* gives useful guidance on knowledge particularly at paragraph 5.15.

83. It is for the tribunal to assess for itself the reasonableness of adjustments. The Equality and Human Rights Commission Code of Practice gives useful guidance at paragraphs 6.28 and 6.29 upon potentially relevant factors. These include allocating duties to another worker.

Time limits for discrimination

84. S. 123 EqA provides:

> *"(1)Proceedings on a complaint within section 120 may not be brought after the end of—*
> *(a)the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b)such other period as the employment tribunal thinks just and equitable.*
> *…*
> *(3)For the purposes of this section—*
> *(a)conduct extending over a period is to be treated as done at the end of the period;*
> *(b)failure to do something is to be treated as occurring when the person in question decided on it.*
> *…"*

85. Section 140B sets out the extension of time limits to facilitate conciliation before bringing a claim:

> "*(1)This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).*
>
> *(2)In this section—*
> *(a)Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*
> *(b)Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*
>
> *(3)In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.*
>
> *(4)If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*
>
> *(5)The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section."*

86. In *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96 the Court of Appeal confirmed that in deciding the question of conduct extending over a period:

> *"The focus should be on the substance of the complaints … was there an ongoing situation or a continuing state of affairs in which officers … were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts".*

87. In considering whether separate incidents form part of an act extending over a period, "one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents" (*Aziz v FDA 2010 EWCA Civ 304*, CA).

88. There is a "very broad general discretion" conferred on tribunals to decide whether it is just and equitable to extend time *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 per Underhill LJ at [37]. The "best approach" is for the Tribunal to "assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular … 'the length of, and the reasons for, the delay'" (paragraph 37).

Conclusions

89. As decided by Judge Rea, the Claimant is disabled by virtue of his prolapsed intervertebral discs at the relevant times.

Direct discrimination

b) Did the Respondent do the following things:

(i) In early February 2022 the Respondent delaying in informing the Claimant about using his own desk and said he could not use it without a doctor's note;

90. The facts that we have found do not support the Claimants allegation. Claimant provided a doctors note on 30 June which recommended adjustments including a standing desk. The Claimant's grievance on 25 July 2022 said that he had requested the desk in May, not February. On 25 July 2022 he says "*The adjustments which I consider you have failed to make are letting me use my standing desk or arranging for a standing desk or keeping in communication the reason why there was a delay."* There is no evidence that the Respondent said he could not use his own desk without a doctors note. In any event, on 9 August a manual standing desk is provided. The Respondent's evidence is that they would require a proper assessment before allowing a person to bring in equipment, they have obligations to that individual but also to others in the workplace. They therefore arranged the Posturite assessment. The Claimant used the standing desk for a period and then requested an electric standing desk which was provided on 1 September 2022.

91. The Tribunal concludes that the Claimant has not shown that facts from which the court could decide, in the absence of any other explanation, that the Respondent contravened the provision concerned as he has not shown that "In early February 2022 the Respondent delaying in informing the Claimant about using his own desk and said he could not use it without a doctor's note". The burden does not shift to the Respondent and the complaint fails.

(ii) Insisting on the Claimant undergoing an independent assessment even though he had provided a doctor's note;

92. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage).* The Respondent did request that the Claimant go through independent assessments even though he had provided a doctor's note, the Posturite assessment and the Occupational Health Assessment. The doctors note was dated 30 June 2022. The Posturite assessment was agreed on 5 July 2022 and the assessment took place on 27 July. It was to the Claimant's benefit as it specified what equipment would be helpful for him.

93. The Claimant later said that he could only work an hour a day and so an occupational health referral was made. Once he provided the letter from the osteopath he was allowed to work one hour a day (although his changed with the OH advisor came back with a different opinion).

94. Why was the Claimant treated as he was? Because he raised health needs that the Respondent had a duty to investigate further.

95. To sense check this conclusion the Tribunal has gone on to consider the issue of a comparator. Very little information was put forward about the Claimant's comparator Philip Aegis from both the Claimant and the Respondent, it was not possible for the Tribunal to analyse whether he was in the same circumstances as the Claimant. A hypothetical comparator would be a hypothetical person where there was no material difference between their circumstances (with the same skills and needs) but without the disability. Any employee who raised work station issues via a doctor's note would have been referred to an assessor to ensure that their work station is properly assessed. Any employee who requested to only work for one hour a day would have been referred to occupational health and treated in the same way. There was no less favourable treatment. This complaint therefore fails.

(iii) Placing the Claimant on sick leave in or around May 2022

96. The Claimant has not shown that he was placed on sick leave in or around May 2022. He was off sick at that time. He was allowed to self certify and his manager Mr Evans did not tell HR so that he would continue to be paid. Later his manager suggested that he convert some of the leave to annual leave so that he would be paid and the Claimant was pleased. The first time the Claimant provided a sick note was 30 June 2022.

97. The Tribunal concludes that the Claimant has not shown that facts from which the court could decide, in the absence of any other explanation, that the Respondent contravened the provision concerned as he has not shown that he was placed on sick leave in or around May 2022. The burden does not shift to the Respondent and the complaint fails.

(iv) Disregarding the recommendations of Posturite which were made in a report, at the end of July 2022, in respect of an automatic desk.

98. The GP's note dated 30 June 2022 did not specify that the standing desk must be electric. The Claimant himself did not specify this when he requested the standing desk on 21 July 2022. The Posturite report dated 27 July 2022 did recommend an electric sit/stand desk. No evidence was provided to the Tribunal as to why a manual desk was initially provided on 9 August. The Claimant worked with it and then after a period complained and the Respondent obtained an electric desk on 1 September 2022 which they would not have done had they been disregarding Posturite's recommendations because of his disability. The Respondent has shown that that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

99. Was the Claimant treated less favourably because of his disability? The Tribunal concludes that he was not. A hypothetical comparator, in other words a hypothetical person, in the same circumstances but without the disability (someone who has the same abilities and needs – a person without a disability but who needs to stand up and down while working) would have been treated exactly the same. This complaint therefore fails.

Harassment

100. Did the Respondent do the following:

(i) On 22 September 2022, John Ramirez advising the Claimant that '*[his] disability doesn't work from a commercial perspective*';

(ii) On 7 November 2022, John Ramirez advising the Claimant that '*[his] disability doesn't work from a commercial perspective*';

(iii) On 10 November 2022, Duncan Gibb advising the Claimant that '*[his] disability doesn't work from a commercial perspective*'.

101. The Tribunal has found that Mr Ramirez told the Claimant that a phased return of one hour a day does not work for the Respondent from a commercial perspective. The Tribunal has not found that the Claimant was told it was his disability that did not work from a commercial perspective. In any event these allegations do not make sense with the facts of what was happening at the time given the Respondent was trying to get the Claimant back into working with adjustments. The Claimant has not shifted the burden and the three complaints of harassment therefore fail.

Reasonable Adjustments

102. The Respondent knew about the Claimant's disability by July 2022. Mr Evans did not give evidence to the Tribunal but the Tribunal have decided that Mr Evans knew about the Claimant's disability. He knew that the Claimant had back pain, that he attended medical appointments for it including physiotherapy, that he took plain killers for it. He knew but chose not to share that information with facilities until May 2022 and HR or upper management until June 2022. By that time the Claimant was off sick and unable to work. The reason why we have concluded that is because we

accepted Ms Welford's evidence that managers are not trained on disabilities or health issues and because he deliberately did not inform HR that the Claimant was off sick so that he would continue to receive full pay.

103. The Claimant says that the Respondent has the following PCP:
    (i) To get any correspondence from a GP or osteopath confirmed by an independent assessor.

104. The Claimant says that this put him at a substantial disadvantage compared to someone without his disability, in that it delayed him having the necessary tools to be able to work.

105. The Claimant provided a doctors note on 30 June 2022 with little information on it. A Posturite assessment was undertaken which did a detailed assessment of his work station. On 6 October 2022 the Claimant provided a letter from his osteopath recommending that he restart work for an hour a day as soon as possible. An Occupational Health professional met with him and provided a report on his health and recommendations to the Respondent. The Claimant has not shown that there was a PCP in existence to get <u>any</u> correspondence from a GP or osteopath confirmed by an independent assessor. The Tribunal concludes that the referrals were made because it was appropriate to do so not because there was a PCP that <u>any</u> correspondence from a GP or osteopath must be confirmed by an independent assessor.

106. However, even if the PCP did exist, it did not place him at a substantial disadvantage. Having a work station assessment by a specialist who then recommends equipment is favourable, as is a report by a medically qualified person who understands the workplace.

107. The Claimant says that the lack of an auxiliary aid, namely an automatic desk, put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he could not work without it.

108. A standing desk was suggested by his GP on 30 June 2022 and the Claimant on 21 July 2022. The Posturite assessment was carried out on 27 July 2022. It did specify an electric standing desk, although the Claimant did not know this because the report was not shared with him until 22 September 2022. There was a delay in providing the standing desk to 9 August 2022.

109. He received a standing desk on 9 August 2022 as suggested by the GP. He then used the standing desk for a period and requested an electric one which he received on 1 September 2022. He had other adjustments in place such as reduced hours and duties whereby viewings would be conducted by other members of the team. The Respondent does not argue that the electric desk was not a reasonable adjustment. They argue that the Claimant has not proven substantial disadvantage and that the Respondent does not accept knowledge of any substantial disadvantage.

110. The missing auxiliary aid of an electric desk did put the Claimant at a substantial disadvantage because he could not work without it. He tried the manual one but it was too painful for him. The comparison with persons who

are not disabled is a different test to the comparator text under s.23 EqA. The Respondent knew about the substantial disadvantage because it was recommended in the Posurite report and the Claimant himself said so. The Tribunal concludes that it is a disadvantage which is linked to the disability.

111. Can the Respondent show that it did not know and could not reasonably have been expected to have known that the Claimant was a disabled person and likely to be at that disadvantage? The Respondent knew that the Claimant was a disabled person, Mr Evans knew about the Claimant's disability and chose not to share that information with facilities until May 2022 and HR or upper management until June 2022. Did they know that he was likely to be placed at the disadvantage? The Tribunal concludes that from 27 July 2022, the date of the Posturite Assessment, the Respondent knew the Claimant would be likely to be at a disadvantage without an electric desk.

Has the Respondent failed in its duty to take such steps as it would have been reasonable to have taken to have avoided that disadvantage or to have provided the auxiliary aid or service? The position is different in auxiliary aid cases where the employer has to take such steps as it is reasonable to take to have to provide the auxiliary aid. When was it reasonable for the Respondent to take the step of providing an electric desk? We know that the Respondent had considered the Posturite report by 4 August 2022 as that is when they said to the Claimant that he cannot have a copy but all of the adjustments he had requested are to be put into place. The Tribunal concludes that a month to six weeks was a reasonable period for the Respondent to source the desk, order it, assemble it and have it in place for the Claimant. The Tribunal concludes that they therefore did take such steps as was reasonable to take to provide the auxiliary aid, as the electric desk was ready for the Claimant to use by 2 September 2022. This complaint therefore fails.

_____

Employment Judge **Burge**

_____

Date: 21 June 2024

Public access to employment tribunal decisions
Judgments (apart from judgments under rule 52) 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/