Case No: 2301018/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr A Raza

Respondent: STM Group (UK) Limited

Heard at: London South Employment Tribunal by video (CVP)

On: 3 – 7 June 2024
Before: Employment Judge Macey
Mrs Jerram
Mr Singh

Representation
Claimant: Mr Martins, solicitor
Respondent: Mr Bunting, counsel

JUDGMENT having been given to the parties on 7 June 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

CLAIMS AND ISSUES

1. The claim is about:
(i) Discrimination arising from disability (section 15 of the Equality Act 2010).
(ii) Failure to make reasonable adjustments (section 20/21 Equality Act 2010).
(iii) Harassment (section 26 Equality Act 2010)
(iv) Victimisation (section 27 Equality Act 2010) – This claim was withdrawn by the claimant during submissions.

2. The respondent's defence is that it denies all the claims.

3. The issues the tribunal will decide are set out below.

1. Disability

1.1 It is accepted by the respondent that the claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about.

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the respondent treat the claimant unfavourably by:

2.1.1 Being invited on 15 November 2021 to a disciplinary hearing;

2.1.2 On 2 December 2021 his disabilities were not adequately considered.

2.1.3 Managing his performance and attendance (including his punctuality):

2.1.3.1 Not adequately dealing with his grievance raised on 30 November 2021;

2.1.3.2 On 15 February 2022 being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action.

2.2 Did the following things arise in consequence of the claimant's disability:

2.2.1 His absence from work;

2.2.2 His regular lateness.

2.3 Was the unfavourable treatment because of any of those things?

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

2.4.1 Efficient running of its business.

2.5 The tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.5.2 could something less discriminatory have been done instead;

2.5.3 how should the needs of the claimant and the respondent be balanced?

2.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

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

3.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

3.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

3.2.1 The requirement to attend work;

3.2.2 The requirement to attend work on time;

3.2.3 The requirement to attend work as a customer services assistant which included attending the gate-line, assisting commuters and undertaking security checks on the work premises.

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability:

3.3.1 The requirement to attend work – by being subjected to attendance management processes.

3.3.2 The requirement to attend work on time - by being subjected to disciplinary processes.

3.3.3 The requirement to attend work as a customer services assistant - he had physical limitations as to what he could do including he became tired and breathless every day.

3.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

3.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

3.5.1 Flexibility as to attendance;

3.5.2 Flexibility as to punctuality;

3.5.3 Regular breaks.

3.6 Was it reasonable for the respondent to have to take those steps and when?

3.7 Did the respondent fail to take those steps?

4. Harassment related to disability (Equality Act 2010 section 26)

4.1 Did the respondent do the following things:

4.1.1 Being invited on 15 November 2021 to a disciplinary hearing;

4.1.2 On 2 December 2021 his disabilities were not adequately considered;

4.1.3 Managing his performance and attendance (including his punctuality):

4.1.3.1 Not adequately dealing with his grievance raised on 30 November 2021;

4.1.3.2 On 15 February 2022 being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action.

4.2 If so, was that unwanted conduct?

4.3 Did it relate to disability?

5. Remedy

5.1 How much should the claimant be awarded?

PROCEDURE/ BUNDLE

4. For the claimant, the tribunal heard evidence from the claimant. For the respondent, the tribunal heard evidence from Miss Hurst (Head of People at the respondent).

5. There was an agreed bundle of 121 pages ("Bundle"). There was also an agreed Supplemental bundle of 86 pages, this was prepared by Mr Bunting and consisted of additional documents sent by the claimant that were not already in the Bundle. Also, it was agreed that the tribunal could refer to one other additional document titled "ABZ11 Disability Motice".

6. On day three of the hearing (5 June 2024) the claimant did not attend until 11 am. Mr Martins had no objections to proceeding without the claimant and the claimant had already finished his evidence on day two of the hearing.

FACTS

7. In 2003 the claimant's bladder was augmented (cystoplasty). As a result of this operation the claimant must use a catheter to empty his bladder day and night [B70-B71] In 2007 the claimant received a kidney transplant. The case management order dated 9 October 2023 at paragraph 13 [A29] says the claimant says that he is a kidney transplant recipient and has a reconstructed bladder. This paragraph also confirms that the respondent accepts that this is a disability. The respondent does not accept that the later diagnoses of anxiety and depression are disabilities.

8. The claimant experiences frequent infections of the bladder, constant feelings of pain which means that he has difficulty sleeping and feelings of fatigue. The claimant also takes immunosuppressant medication and has regular hospital appointments.

9. The respondent does not have an occupational health department but Miss Hurst is aware that third party providers do conduct occupational health assessments and provide occupational health reports to businesses.

10. The claimant started employment with the respondent (who provides staffing at train stations for various clients and has approximately 1100 employees) on 30 August 2018 as a customer service assistant, he has a written contract of employment ("Contract") [B5 – B19]. The claimant worked on the gate-line, manning the ticket barriers to the station for one of the respondent's clients, South Western Railway. The claimant's employment is still ongoing.

11. Section 5 of the Contract is about hours and overtime. This stated the claimant's normal hours of work will be a minimum of 20 hours per week. That the times when he is required to work will be provided on the assignment and roster or rotation pattern in advance of the shift.

12. Clause 5.3 states:

    "*The Company reserves the right to require you to work different hours of work according to the needs of the business, whether on a temporary or a permanent basis. This may involve shorter or longer hours of work or working … at different times of the day in accordance with operational requirements."*

13. This is a standard term in all the respondent's customer service assistant's contracts.

14. There is no evidence in the Bundle or Supplemental bundle of the rosters or shifts that the claimant had worked or been allocated. In cross-examination Miss Hurst confirmed the claimant was starting his shifts at 14.00 and the respondent has shifts 24 hours a day, 7 days a week.

15. Section 6 of the Contract is about salary it stated remuneration will be as specified by the site rate matrix. It also states that remuneration will be underpinned by the national minimum wage applicable to the claimant.

16. Clause 10.1 of the Contract states the claimant is entitled to Statutory Sick Pay.

17. Appended to the Contract is a disciplinary procedure and a grievance procedure.

18. The schedule of loss [A43-A44] states the claimant's gross monthly wage is £860 (we noted that the ET1 [A1-A17] and ET3 [A19-A26] are silent about pay and there is no respondent's counter-schedule of loss). Miss Hurst confirmed the claimant was only paid according to the actual length of time the claimant was working on a shift. In cross-examination the claimant also stated he was only paid for shifts completed at the respondent.

19. The respondent has an equality, diversity and inclusion policy ("Policy") [Supp bundle 1-3].

20. This states:

    "*STM aims to create an environment free of discrimination, prejudice, bullying, harassment, victimisation and unlawful discrimination, whilst ensuring that every individual is treated with dignity and respect.*

    "*STM commits to making reasonable adjustments for colleagues or applicants who are, or become, disabled. Individuals are encouraged to inform the Company of any such conditions, in order that due consideration may be given to the introduction of all reasonable adjustments or support*."

21. Since Miss Hurst started her employment at the respondent (approximately since November 2019) the respondent's staff have not received training on

the Policy and nor has Miss Hurst. Miss Hurst has used the Policy in respect of other employees (she was unclear on how many times).

22. The respondent has contracts with its clients and is delivering a service to its clients. In cross-examination Miss Hurst stated that a key performance indicator in the respondent's contracts with its clients is the lateness of the respondent's employees. There is no documentary evidence in the Bundle or Supplemental bundle supporting that.

23. If a customer service assistant is late attending the start of their shift at the train station cover for that employee would either be another member of staff of the respondent (provided there is one present and they have not completed too many hours that day already and provided they are able to stay at short notice) or a supervisor could cover at short notice, but that would be a last resort. Supervisors have access to pool cars.

24. An initial medical questionnaire was completed by the claimant on 30 August 2018 [B1-B4] this did not explain his health condition to the respondent.

25. In an email dated 10 January 2019 at 11.26 am from SWR scheduler Mr Rahman (a scheduler at the respondent) to the claimant [Supp bundle 16-17] it states:

    "*Please be advised that we have recorded your lateness/ blow-out/ sickness on the Bradford Factor criteria.*

    Please be advised that further occurrences will lead to more points being allocated to you which could lead to disciplinary"

26. The claimant replied [Supp bundle 16] on 10 January 2019 at 11.31 am, he stated:

    "*I believe I had genuine reasons for my sickness if you would like documented evidence I can get from my gp surgery that would not be a problem as I would not like a bad record on my employment."*

27. There is no evidence (in the Bundle or Supp bundle or otherwise) whether someone at the respondent replied to this email, nor whether the evidence from the GP surgery was requested by the respondent. Also, there is no evidence that any kind of welfare check was carried out by the respondent with the claimant at this time. Miss Hurst does not know whether this was requested or whether a welfare check was conducted but her assumption was that it would have been forwarded to operations and human resources department ("HR") would have asked operations to have a conversation with the claimant.

28. In June 2020 the claimant was informed all shifts start at 14.00 in a WhatsApp message [Supp bundle 9].

29. In August 2020 the claimant mentioned his kidney transplant to Mr Syed (Station Manager) in a WhatsApp message [Supp bundle 11 -12].

30. In an email on 7 August 2020 to Mr Smith (senior operations manager) [B20] the claimant mentioned he is shielding. Mr Smith has now left the respondent.

31. On 9 March 2021 the claimant completed a second medical questionnaire [B24-B25] In answer to the question "*Have you consulted a Doctor within the last two years about an illness or disability?"* the claimant stated, "*UTI infections/ Kindey*" and he confirms this has led to one day absence from work.

32. In answer to the question "*Are you taking or are you being given any medicines, inhalers, injections or eye/ear drops at the present time?*" the claimant stated, "*ADOPORT 2MG/SODIUM BICARBONATE 500MG/PREDNISOLONE 10MG/ALFACALCIDOL 1MG TAKEN DAILY SINCE 2007 AFTER KIDNEY TRANPLANT*".

33. In answer to the question "*Do you have any other medical conditions?*" the claimant stated, "*BLADDER RECONSTRCUTION*".

34. There is no evidence (in the Bundle or Supplemental bundle or otherwise) that at this stage (March 2021) a support plan was put into place for the claimant nor whether conversations took place with the claimant about his condition and how the respondent could support him.

35. Mr Smith emailed the claimant on 20 May 2021 concerning the claimant's performance [Supp bundle 15]:

    "*Irrespective of the reasons why you were late, you are not providing the level of service I am prepared to accept on this contract and your suitability to continue on this contract is now in question."*

    "…I note you were 1 hour 22 minutes late yesterday because of a hospital appointment, however you did not inform us until 2 minutes before the start of your shift,"

    "…I will now be monitoring your performance daily and if you continue to be late it will most probably require your removal from the contract and formal disciplinary proceedings under the companies disciplinary policy."

36. There is no evidence of what conversations were had with the claimant in May 2021 about what support the respondent could provide to him. The respondent had rostered the claimant for a 14.00 start and then from May 2021 decided to observe his performance daily.

37. There is a list of lateness of the claimant between 30 June 2021 and 15 July 2021. There were 13 instances of lateness varying from 20 minutes to 2 hour 41 minutes [Supp bundle 50].

38. An SWR Investigation Form (a JotForm) was completed by Mr Stevenson on 19 July 2021 in respect of the claimant being late on 14 July 2021 [B30]. This refers to the kidney transplant and the claimant's need to use a catheter to drain the claimant's bladder overnight (the claimant in cross-examination confirmed he has a catheter all the time). The JotForm also states that at that time the claimant was having infections and the catheter was blocking and so the claimant was having to drain his bladder in the morning on waking. Also, at that time he was experiencing pain and was having trouble sleeping. On that particular day the claimant woke up at 1 pm and did not give himself enough time to prepare for work. Mr Stevenson suggested that he wake up earlier if it takes the claimant that long to prepare and they cannot have someone coming into work an hour or more late.

39. The claimant's lateness that particular week had been 6-7 hours.

40. The JotForm [B30] also notes that Mr Ghosh has been sent evidence of the claimant's condition and this is with HR and that Mr Smith is aware of the condition.

41. It also states under item 6 of the JotForm [B30] that to ensure that it does not happen again the claimant will try to wake up earlier but the claimant said there was not much he can do about his condition.

42. A further JotForm was completed on 20 July 2021 by Mr Stevenson for lateness of the claimant on 20 July 2021 [Supp bundle 29-30]. The JotForm states the claimant was late because of starting a course of antibiotics, and that he again woke up at 1 pm for a 2 pm start. The JotForm states that on this day the claimant did not make anyone aware and that the claimant cannot ensure that it will not happen again. The investigator's suggestion was disciplinary.

43. The claimant sent further information about the impact his disability was having on his punctuality to the respondent [ABZ11 disability motice]. This is undated but due to the reference of the completion of the medical questionnaire a few months prior, it is most likely to have been sent in June/ July 2021. This states:

> "*I HAVE HAD A KINDEY TRANSPLANT AND ALSO HAVE HAD MY BLADDER RESONSTRCUTED I TAKE MEDICATION MORNING AND NIGHT IMMUNSUPPRESANT MEDICATIONS WHICH IS FOR LIFETIME RECENTLY MY PERMFORANCE AT WORK HAS BEEN IMPACTED DUE TO ON GOING COMPLICATIONS I AM FACING. I HAVE BEEN WITH YOUR COMPANY COMING UP TO THE THREE*

> *YEARS ONLY RECENTLY I DID NOT WANT TO EXPLAIN MYSELF AS I LIKE TO KEEP MY PERSONAL LIFE AWAY FROM WORK BUT ITS SEEMS IT HAS COME TO A POINT THAT I AM HAVING TO EXPLAIN MY SITUATION OVER AND OVER AGAIN I HAVE SENT HR RELEVANT EVIDENCE RELATING TO MY HEALTH CONDITION AND RECENTLY FEW MONTHS BACK I HAVE SENT MY MEDICAL QUESTIONAIRE TO WHOM IT MAY CONCERN…*
>
> *…I HAVE BEEN ATTENDING WORK RECENTLY LATE ON MANY OCCASIONS WHICH I CAN SINCERELY APLOGISE FOR MY LATENESS DUE TO UNFORESEEN CIRCUMSTANCES WHICH WAS BEYOND MY CONTROLTO MAKE YOU UNDERSTAND I HAVE TO PUT A DRAINAGE BAG AT NIGHT TO DRAIN OUT MY BLADDER WHICH HAS BEEN CAUSING A LOT OF DISCOMFORT THROUGH OUT THE NIGHT WHICH HAS BEEN IMPACTING MY SLEEP I A TRYING TO MY UPMOST BEST TO RESLOVE THIS SITUATION AS I WILL GO TO THE HOSPITAL TOMORROW TO RESOLVE THIS ISSUE SO I CAN HAVE GET BACK TO NORMAL ROUTINE AS USUAL AS I DO NOT WANT TO COME LATE TO WORK AND MISS OUT ON HOURS…"*

44. On 31 July 2021 the claimant did not attend work due to the infection and taking antibiotics [Supp bundle 18].

45. As a result of the disciplinary the claimant was given a final written warning on 7 August 2021 [Supp bundle 85]. This states:

> "*My reason for this warning is that I have considered your conduct in relation to your time keeping and attitude. There is a regular pattern of being constantly late, furthermore there is a lack of willingness from you to improve this matter."*

46. In this letter the respondent also reminded the claimant that the respondent is running a business and needed to provide a service to the respondent's client.

47. The claimant did not appeal against the decision to give him a final written warning.

48. On 27 October 2021 the claimant emailed Mr Smith to inform him that the claimant's bladder was playing up and he was going to hospital to sort it out [Supp bundle 52].

49. In November 2021 the claimant did not attend work or contact the control room to advise that he was not going to attend. This was due to personal circumstances (a family member's burial, not his disability [B56]**.** The claimant was not disciplined for this instance.

50. On 12 November 2021 the claimant WhatsApp messaged Nabil at 1.16 pm to inform him of his hospital appointment on 12 November 2021 and that the claimant has told control and he will be there by 2.30 pm at the latest [Supp bundle 24].

51. A SWR Investigation Form (General) JotForm dated 12 November 2021 was completed by Mr Buckham about the claimant's lateness on 12 November 2021 [B51]. This states*:*

    "The officer had a bladder appointment and thought he was going to be on time however due to his journey plan the officer realised that he was going to be late for his shift, the officer said that he sent an email to STM Booking regarding his lateness, he contacted STM control regarding this particular instance, he he contacted supervisor Nabil to inform him…"

    "…Yes, he feels it is acceptable as his health is important"

    "…*If he has an appointment it's his responsibility to inform STM control of any alterations in a reasonable time"*

52. The investigation report says that the claimant did contact STM control when he realised he was going to be late. In cross-examination the claimant confirmed he had contacted control too.

53. The investigator suggested disciplinary in this JotForm [B51].

54. In cross-examination Miss Hurst said that the respondent considered that the lateness and shortness of notice about lateness were one and the same thing.

55. In cross-examination Mr Bunting put to the claimant in respect of the hospital appointment on 12 November 2021 would not it have been more reasonable to take time off for the appointment, the claimant replied "*in a normal world, yes. In this company, no.*"

56. The respondent says that the disciplinary scheduled in December 2021 was due to lateness and short notice of that lateness.

57. Miss Hurst advised the relevant managers, but she was not a decision-maker.

58. On 15 November 2021 the claimant received a letter from the respondent inviting him to a disciplinary hearing on 18 November 2021 [B54] (this letter is incomplete). The reason in the letter was alleged misconduct on 12 November 2021, which was lateness at Clapham Junction on 12 November 2021. This letter enclosed the investigation report [B51].

59. On 30 November 2021 the claimant raised a grievance by letter [B57-58]. This states:

"*Please accept this letter as a formal grievance.*

BRIEFLY (I HAVE WORKED FOR YOUR COMPANY FOR OVER 3 YEARS YOU ARE AWARE THAT I HAVE A LONG-TERM ILLNESS WHICH YOU ARE AWARE OF ELECTRONICALLY WHICH HAS IMPACTED MY PERFORMANCE IF I DID NOT HAVE THIS ISSUE I WOULD NOT BEEN IN THIS POSITION I HAVE SENT NUMERUOUS EXPLAINATIONS AND EVIDNCE TO BACK MY CLAIMS THOUGHOUT 2019/2020 AND IT BELIEVE IT HAS BEEN DISREGARDED BY YOUR SELF. I RECEIVED DISCIPLINARY PREVIOUSLY EVEN THOUGH I PROVIDED ALL THE EVIDENCE GIVEN AND PUT FORWARD TO YOUR SELF. YET AGAIN I AM FACING DISCIPLINARY AGAIN WHICH I WILL GIVE MY ACCOUNT FOR. ON THE 30/11/2022 I TRAVELLED TO WORK AS I WAS ROASTERED FOR THIS WEEK WHEN I GOT THERE MY SHIFTS WERE TAKEN OFF NOT ATTENDING NO CALLS OR COMMUNICATION WHICH IS VERY UNPROFFESIONAL TAKING AWAY MY SHIFTS IMPACTING MY FIANCIAL SITUATION. I AM BELIEVE I AM BEING TREATED UNFAIRLY AND FEEL DISCRIMINATED AND COMPLETELY DISREGARDED EVERYTHING THAT I HAVE PUT FORWARD NOT PUTTING ANY MEASURES IN PLACE OR EVEN UNDERSTANDING THE SITUATION TO YOU SO I HAVE HAD TO TAKE THESE STEPS FOR GRIEVANCE UNDER THE EQUALITY ACT 2010.

The Equality Act 2010 (the Act) says that I am protected against unlawful discrimination at work in relation to my disability.

Discrimination arising from disability is defined in the Act as:

- *Unfavourable treatment, because of something arising in consequence of that persons disability, and*
- *It cannot be shown that the treatment is a proportionate means of achieving a legitimate aim ('objective justification').*

I have tried resolving this matter (I HAVE PROVIEDED MEDICAL EVIDENCE I HAVE COMMUNCATED NUMERUOUS TIMES THROUGH OUT WITH … SMITH OPERATIONS MANAGER AND OTHERS. but I am not satisfied with the outcome. Consequently, I would like to formally raise my concerns through a grievance in accordance with the company's grievance procedure. The reason for this it to investigate my concerns, with a view to resolving the concerns which I have raised."

60. On 1 December 2021 the respondent notified the claimant of the disciplinary hearing on 2 December 2021 at 11 am [B61-B62]. The reason in the letter was lateness at Clapham Junction on 12 November 2021. He was informed of his right to be accompanied. This letter also informed the claimant of the risk of dismissal due to the active final written warning on file.

61. The claimant attended the disciplinary hearing on 2 December 2021.

62. There are notes of the disciplinary hearing on 2 December 2021 [B64 -B67]**.** The hearing was conducted by Senior Operations Manager (Mr Anderson) and the note-taker was HR Co-ordinator (Ms Udeme) (Ms Hurst was also present at this meeting). The notes state:

    "*DA: WE GOING TO ALKING ON LATENESS THAT WAS DONE ON THE*

    12/11/2021

    "REFERES TO Report

    …

    DA: Can you walking me through this day.

    AR: I had an appointment

    DA: So you were aware of this before, why did you not inform control room of this

    AR: because you lot don't take situations seriously"

    …

    "DA: So you did not inform anyone because information is not taking seriously

    AR: I did inform someone. I told control and the supervisor and asked him if I should go to the shifts"

    …

    "DA: have you had a previous late history.

    AR: Yes I have, due to my health issues.

    DA: Have you informed us about this issues.

    AR: I have provided the reasons via medical questionnaire.

    DA: Reasons for not providing notice is because the company do not take things seriously. Can you elaborate on that,

    AR: you want me to elaborate.

    DA: Yes, you must have experience where this has happened.

    AR: Yes, I do not feel as though issues raised have been taken seriously.

    …

    "DA: when did you know of this appointment, bladder appointment

    AR: few weeks before the appointment

    …

DA: when did you inform STM control that you were running late.

AR: I have to check my email for the time stamp

DA: an hour before or half an hour before.

AR: yes

DA: you have been in the company for a while, how does lateness affect the company.

AR: Your contracted with SWR, and if an officer is late, it could affect the company.

DA: I asked how does being late affect the company.

AR: it affects the company as they may lose the contract.

DA: So you know this but you do it.

AR: yes but not intentionally.

…

*DA: just looking at your Bradford factor report *list out all the absences/nlow out**

I am looking at a few blowout, where you have not informed control that your not attending. Can you provide a reason,

AR: I cannot give an explanation as I have to look back at the reasons provided via email.

…

DA: Based on all this, why should I keep you in the company

AR: keeping on the company, that's based on the grievance.

*DA: on the evidence presented in front of me, *list out the evidence**

AR: that not because of not informing, if there is absence, there is a justification behind it."

…

"DA: hello Absher, based on evidence presented today, I am going to ask you send me all the evidence. I am going to go away and look at the today's hearing. And make a decision, my decision will be in writing, by Monday/ Tuesday next week, you will receive a decision."

63. There is nothing in the Bundle or Supplemental bundle about what evidence was sent to Mr Anderson by the claimant following the disciplinary hearing. The respondent says that the claimant did not send the respondent any evidence about the reasons for not attending in those instances where he had not informed control.

64. During this meeting the claimant was also informed that the respondent's client had requested the claimant's removal from the contract at Clapham Junction station.

65. Also, on 2 December 2021 the claimant's grievance hearing took place at 12.00 pm [B28], Miss Hurst was present. The grievance outcome letter [B28] states that Mr Anderson was present too. The claimant was informed of his right to be accompanied in the letter inviting the claimant to the grievance hearing [B59 - B60].

66. There are no notes of the grievance hearing in the Bundle or Supplemental bundle, though Miss Hurst says there were notes.

67. The claimant has not worked any shifts for the respondent since November 2021. There is no evidence that the respondent made arrangements to discuss with the claimant what support could be provided to the claimant after 15 November 2021. Miss Hurst said the respondent would have had these conversations once the claimant had indicated a willingness to return to work.

68. On 6 December 2021 Miss Hurst emailed the claimant [Supp bundle 57-58]. This email confirmed that the claimant was placed on annual leave from 29 November 2021 to 10 December 2021. There is nothing in the Bundle or the Supplemental bundle to confirm that the claimant received payment for annual leave for this period or that the claimant was actually receiving payment for annual leave after this date nor are there any records demonstrating the claimant was on annual leave after this date.

69. On 15 February 2022 at 4.08 pm Mr Smith emailed the claimant to advise him that in respect of the disciplinary the decision was not to proceed with a formal sanction. Mr Smith also said it was important to reschedule the claimant as the claimant has an obligation to fulfil contracted hours with the respondent. [Supp Bundle 63]

70. On 15 February 2022 at 4.21 pm the claimant emailed Mr Smith [Supp bundle 63] informing Mr Smith the claimant is taking the respondent to the Employment Tribunal.

71. On 15 February 2022 4.33 pm Mr Smith emailed the claimant [Supp Bundle 62] stating,

> "*…employment tribunal is something over and above the scheduling matter …*
>
> *… it is my responsibility in getting you back to work, it is then a matter for you whether you accept these shifts or not, I've instructed Hamza to make contact with you urgently, if you subsequently decline the shifts*

> *this will be recorded against you, as I said in my previous email you are contracted to 5 hours a week which you are obliged to complete."*

72. On 15 February 2022 at 4.49 pm the claimant replied to Mr Smith [Supp bundle 62] stating,

> "*My annual leave has not been resolved and I have been out of work since November… My case to the Employment tribunal is not a dispute on the annual leave matter it's under the discrimination and equality act. Also my contract is 20 hours a week stated on the contract I have.*

73. On 15 February 2022 at 5.33 pm [Supp bundle 62] Mr Smith replied to the claimant stating,

> "*This being the case I will ensure you are scheduled to your contracted hours.*

74. There is a Fit note for the claimant dated 18 February 2022 for the period from 18 February 2022 to 14 March 2022, the reason given for not being fit to work is anxiety [Supp bundle 73]. This was sent to the respondent by the claimant on 24 February 2022 by email [Supp bundle 71].

75. Mr Smith emailed the claimant on 21 February 2022 at 5.10pm [Supp bundle 72] stating,

> *"I have been informed that you have told the control room you no longer work for STM, you have again failed to answer my email of last week asking you to confirm your shifts, we have gone above and beyond to inform you of your schedule but you only appear to respond to selective communication, please provide your resignation email by return alternatively if this is not received I will deal with you through the investigation and disciplinary process for failing to attend your shift today…"*

76. The claimant emailed Mr Smith on 21 February 2022 at 5.27 pm [Supp bundle 72] stating,

> "*Hi there, As I have clearly stated on my previous email to you that I am taking my case to the employment tribunal I have an appointment on Wednesday with my solicitor for legal advice you are not taking the matter serious. I have not stated that I do not work for stm no longer that is incorrect information."*

77. There are further emails between Mr Smith and the claimant on 21 February 2022 [Supp bundle 71].

78. In one of those emails the claimant says,

> "*I would appreciate if you can stop trying to blackmail me thank you."*

79. On 8 March 2022 Miss Hurst emailed the claimant [Supp bundle 68-69] and informed him that the grievance he had raised had been concluded. That she

understood the claimant was absent and was he okay for her to send him the grievance response.

80. On 8 March 2022 the claimant informed the respondent by email [Supp bundle 69] that he had been diagnosed with depression and anxiety for which he was receiving medication and therapy, in this email he stated,

> "*…due to the dealings of the company and the psychological impact it has caused on me. You are more than welcome to send this grievance response.*"

81. On 15 March 2022 the claimant attached a Fit note to an email to the respondent [Supp bundle 69], that Fit note is not in the Bundle or Supplemental bundle.

82. The respondent sent its grievance outcome letter to the claimant on 17 March 2022 [B28]. This letter states that the respondent was informed of the claimant's medical history in March 2021. It also states there was no reference to the claimant's medical condition in his messages concerning reasons for lateness. This letter states,

> "*You stated that despite your managers being aware of your long-term illness nothing has been put in place to assist you and that you are disciplined even though we are aware of your illness*.
>
> *I have looked into this matter, including the evidence you have provided and agree that you have informed your managers of your illness. However this was not done from the start of your employment with us. You did then inform us of your medical history in March 2021… so I believe you should have made us aware of your condition when you started with us and a support plan could have been put in place…*
>
> *…From looking at the evidence that your provided, even going back to May 2021, there is a message apologising for being late due to the route the uber takes, at no point here was this related to your medical condition.*
>
> *…*
>
> *I understand there have been circumstances where you have informed control you cannot attend work, but this has been at short notice. The disciplinary that was scheduled for December 2021 was due to your lateness and short notice, as explained we are understanding that you have to attend appointments, but we do ask for as much notice as possible so that we are able to schedule shifts were there is less risk to you being late.*
>
> "*Having listened to the grievance I believe that there is not a lack of understanding regarding your condition as there has been limited*

> *information regarding this from yourself and what you need and therefore I cannot uphold your grievance, however I do believe it would be of great benefit for yourself and your line manager and a member of HR to have a meeting to discuss what support we can give going forward to ensure these lateness do not occur again."*

83. There is nothing in the Bundle or Supplemental bundle about what evidence the claimant provided in respect of his grievance. There are no notes from the manager who conducted the grievance hearing and investigated (Mr Anderson). Mr Anderson left the respondent a year ago.

84. The claimant was given the right to appeal the grievance outcome. The claimant did not appeal. The claimant says this is because he had lost trust and confidence in those persons responsible in managing the integrity of the appeal process.

85. The claimant says that the grievance outcome letter did not address the lack of support that he had raised in his grievance nor the lack of integrity of the disciplinary hearing.

86. There is a letter from the claimant's GP dated 28 March 2024 [Supp bundle 82 - 83], this confirms that the claimant has been suffering from chronic allograft nephropathy and recurrent UTI symptoms. That he also suffers from anxiety and depression and that he is on sertraline for his depression.

87. It also states,

> "…*as to your question on whether he may be suitable for full time or part time work, I am unable to comment on this as a GP. He would need an occupational health specialist assessment which is not available through the NHS and would need to be done privately*."

88. This letter dates the claimant's mixed anxiety and depressive disorder from 18 February 2022 and his generalised anxiety disorder from 14 March 2022.

89. The claimant says that he doubts he will ever be able to return to full-time duties in any capacity because of the nature of his long-term injuries both mental and physical.

90. ACAS early conciliation commenced on 30 November 2021 and ended on 10 January 2022.

91. The claimant presented his claims to the Employment Tribunal on 18 March 2022.

LAW

92. Section 15 Equality Act 2010 ("EQA") 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.

93. For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably'. This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably (EHRC Code para 5.7)

94. Langstaff P explained the two-step test required for a section 15 claim in **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305**. He said it did not matter in which order the tribunal approaches these two steps:

"*It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.***"**

95. In **Pnaiser v NHS England and anor [2016] IRLR 170 EAT**, Mrs Justice Simler considered **Weerasinghe** and other authorities and summarised the proper approach to determining s.15 claims as follows in paragraph 31:

"(a) 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.

(b) 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.

(c) 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: see Nagarajan v London Regional Transport [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises, contrary to Miss Jeram's submission (for example at paragraph 17 of her Skeleton).

(d) 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. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied on paragraphs 26 to 34 of Weerasinghe as supporting this approach, but in my judgment those paragraphs read properly do not support her

submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) 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. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in Weerasinghe, 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."

96. In respect of whether the treatment is a proportionate means of achieving a legitimate aim cost alone is not sufficient.

97. In considering the principle of proportionality the tribunal's task is to strike an objective balance between the reasonable needs of the respondent against the discriminatory effect of its measure in order to assess whether the former outweigh the latter; that is an objective test. There is no room to introduce into the test the 'range of reasonable responses' which is available to an employer in cases of unfair dismissal.

98. The Equality and Human Rights Commission's statutory code of practice ("EHRC code") guidance states that if an employer has failed to make reasonable adjustments which would have prevented or minimised the unfavourable treatment, it will be very difficult for the employer to show that the treatment was objectively justified.

99. Section 20 of the Equality Act 2010 provides:

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

100. Section 21 of the Equality Act 2010 provides:
(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

101. In **Archibald -v- Fife [2004] IRLR 651** the comparator for a failure to make reasonable adjustments claim are employees who were not disabled, who could carry out the functions of their job and therefore were not at risk of dismissal.

102. The test of reasonableness is an objective one.

103. Making a reasonable adjustment may necessarily involve treating a disabled employee more favourably that the employer's non-disabled workforce.

104. Once a potential reasonable adjustment is identified, the onus is cast on the respondent to show that it would not have been reasonable in the circumstances to have had to take the step.

105. The question of whether it was reasonable for the respondent to take the step depends on all relevant circumstances, which will include (according to guidance in the EHRC code) the following:

a. The extent to which taking the step would have prevent the effect in relation to which the duty is imposed;
b. The extent to which it is practicable to take the step;
c. The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of the respondent's activities;
d. The extent to of the respondent's financial and other resources;
e. The availability to it of financial or other assistance with respect to taking the step;
f. The nature of its activities and the size of its undertaking.

106. Employers need to take proper advice and consult with an employee before making decisions about reasonable adjustments.

107. Section 26 of EQA states:
(1) A person (A) harasses another (B) if:
(a) A engages in unwanted conducted 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.

108. S136 of the Equality Act 2010 sets out the burden of proof. 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.**)

109. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

Compensation under EQA

110. The central aim of any award of compensation is to put the claimant in the position, so far as is reasonable, that she would have been in had the discrimination not occurred.

Compensation for injury to feelings

111. An award for injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment she has received. It is compensatory and not punitive, but the focus is on the actual injury suffered by the claimant and not the gravity of the acts of the respondent.

112. Tribunals have a broad discretion about what level of award to make. The matters compensated for encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, and depression (see **Vento -v- Chief Constable of West Yorkshire Police (No. 2) [2003] IRLR 102**.

113. The court of appeal in **Vento -v- Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102** identified three broad bands of compensation for injury to feelings. There is within each band considerable flexibility, allowing tribunals to fix what is fair, reasonable, and just compensation in the particular circumstances of the case. Compensation must relate to the level of injury to feelings experienced by the particular claimant.

114. Presidential Guidance states that in respect of claims presented on or after 6 April 2021, and taking account of **Simmons -v- Castle [2012] EWCA Civ 1039**, the Vento bands shall be as follows: a lower band of £900 to £9,100 (less serious cases); a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and upper award of £27,400 to £45,600

(the most serious cases), with the most exceptional cases capable of exceeding £45,600. This claim was presented on 18 March 2022.

<u>Interest</u>

115. A tribunal can, and usually will award interest on awards of compensation made in discrimination claims under section 124(2)(b) EQA and the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 ("the Regulations"). Interest is limited to past loss, that is loss to the date of the remedy hearing. The current rate of interest is 8%.

116. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (see reg 6(1)(a) of the Regulations). Interest is awarded on all sums other than compensation for injury to feelings from the mid-point date (reg 6(1)(b)). The mid-point date is the date halfway through the period between the date when the tribunal calculates the award (reg 4).

117. The tribunal has a discretion to award interest on a different basis if it considers that serious injustice would otherwise be caused.

The burden of proof

118. It is for a claimant to prove his loss and this will include proof of the causal link between the unlawful treatment and the loss. In many cases this will be obvious or relatively easy for a claimant to achieve.

Claimant is obliged to take reasonable steps to mitigate his loss

119. The claimant is under an obligation to take reasonable steps to mitigate his loss, but it is for the respondent to prove with evidence that he has failed to do so.

CONCLUSIONS

1. Disability

120. It is accepted by the respondent that the claimant had a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about.

121. There is a degree of overlap between the complaints presented by the claimant and the tribunal has considered each of those complaints.

122. We have decided that it is appropriate to address first the complaint that the respondent failed to comply with the duty to make reasonable adjustments as our decisions in respect of that complaint will inform our decisions in respect of the complaint of discrimination arising from disability.

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

<u>3.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?</u>

123. In submissions the respondent conceded that it had knowledge of the claimant's disability from 2020.

3.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

3.2.1 The requirement to attend work

124. The respondent did have a PCP that its employees attend work and this is a PCP in law.

3.2.2 The requirement to attend work on time

125. The respondent did have a PCP that its employees attend work on time and this is a PCP in law.

3.2.3 The requirement to attend work as a customer services assistant which included attending the gate-line, assisting commuters and undertaking security checks on the work premises

126. No evidence was presented about this PCP by the claimant nor was there any evidence in the Bundle or Supplemental bundle. The claimant did not cross-examine the respondent's witness on this PCP and in submissions the claimant conceded he was not pursuing this PCP as part of his claim.

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?:

3.3.1 The requirement to attend work – by being subjected to attendance management processes?

127. In respect of the remit of the claim (in the claim form and list of issues) the instance in which the claimant was required to attend work and was then informed that failure to attend would be recorded against him was in the email from Mr Smith on 15 February 2022 [Supp bundle 62].

128. We conclude that the words used in that email were threatening investigation and disciplinary (though nothing in fact did actually happen). The claimant was not subjected to attendance management processes but he was subjected to an indirect threat of attendance management.

129. We conclude that this did put the claimant at a substantial disadvantage compared to someone without the claimant's disability because the respondent was still not as of 15 February 2022 offering to have a conversation with the claimant about what support it could offer the claimant to return to work and instead was threatening to record any absences against him.

3.3.2 The requirement to attend work on time - by being subjected to disciplinary processes

130. In July 2021 the claimant had a bladder infection which was blocking up his catheter and he needed to drain his bladder and he was experiencing pain due to the

infection which meant that he had trouble sleeping (JotForm dated 19 July 2021 [Supp bundle B30]). The claimant only awoke at 1 pm on 14 July 2021.

131. We conclude that the pain he experienced affected his sleep which meant he had difficulty waking up in time to get to his shift at 2 pm on 14 July 2021.

132. On 20 July 2021 the claimant attended late again because he had started a course of antibiotics and again had woken up at 1 pm for a 2 pm start. Mr Bunting submitted that he is not sure how taking antibiotics would cause the claimant to be late. We conclude the respondent should have at least asked the claimant about why this would have an impact on his ability to attend work on time.

133. The respondent also did not refer the claimant to occupational health at this point.

134. Instead, the respondent decided the appropriate course of action was to hold a disciplinary hearing and a sanction was imposed of a final written warning.

135. Then on 12 November 2021 the claimant needed to attend a hospital appointment for his reconstructed bladder (which is his disability) and then did not manage to attend work on time. Again, one of the reasons the claimant was invited on 15 November 2021 to a disciplinary hearing was because of his lateness on 12 November 2021.

136. An individual without the claimant's disability would not have been subjected to these disciplinary processes because they would not have suffered from a serious bladder infection and nor would they have needed to attend the hospital for an appointment on 12 November 2021 in respect of their reconstructed bladder.

137. We conclude that this PCP did put the claimant at a substantial disadvantage compared to someone without the claimant's disability.

<u>3.3.3 The requirement to attend work as a customer services assistant - he had physical limitations as to what he could do including he became tired and breathless every day.</u>

138. No evidence was presented by the claimant on how this PCP put him at a substantial disadvantage and Mr Martins confirmed during submissions that the claimant was no longer pursuing this PCP.

<u>3.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?</u>

139. In submissions Mr Bunting conceded that the respondent had knowledge of the claimant's disability at all relevant times.

140. In terms of knowledge of the substantial disadvantage the respondent knew that the claimant had a disability, the respondent did not ask him or engage with him on what support they could provide to him in respect of his lateness or in returning to work (in February 2022) and they did not inform themselves by referring him to occupational health.

141. Instead, they pressed ahead with disciplinary action in respect of his lateness and made an indirect threat in respect of investigation and disciplinary action on 15 February 2022 in the event of the claimant being scheduled for work and then not attending.

142. We conclude that the respondent reasonably could have been expected to know that the claimant was likely to be placed at the disadvantage.

3.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

3.5.1 Flexibility as to attendance;

143. The claimant's contract stated that he needed to work a minimum of 20 hours per week and extra hours as required.

144. In cross-examination Mr Bunting put to the claimant in respect of the hospital appointment on 12 November 2021 would not it have been more reasonable to take time off for the appointment? The claimant replied, "*in a normal world, yes. In this company, no.*"

145. We have inferred from that statement that the claimant felt that he could not ask for time off to attend his hospital appointments in general and on 12 November 2021 in particular.

146. The adjustment of being flexible as to his attendance would have avoided the disadvantage the claimant experienced on 15 November 2021 in being invited to a disciplinary hearing because if the claimant had felt that he could ask for time off to attend the hospital appointment he would not have been late attending work on 12 November 2021.

3.5.2 Flexibility as to punctuality;

147. This step would have removed the disadvantage the claimant experienced in July 2021 (disciplined for lateness) and the final written warning in August 2021.

148. This step would also have removed the disadvantage the claimant experienced in November 2021 of being invited to a disciplinary hearing.

3.5.3 Regular breaks

149. We conclude that this adjustment would not have removed the disadvantage to the claimant referred to above. This adjustment is more relevant to the third PCP that was not pursued by the claimant during the hearing.

3.6 Was it reasonable for the respondent to have to take those steps and when?

150. Flexibility as to attendance - The respondent did not present any evidence about there being a significant cost implication to make the adjustment of flexibility in respect of attendance, nor did it present any evidence that it would be disruptive. The respondent never asked the claimant about what steps it could take to support the claimant with attending hospital appointments.

151. The respondent has 1,100 employees and therefore we conclude it would not be too disruptive or costly to be flexible on attendance and that it was reasonable for the respondent to be flexible on attendance on 12 November 2021.

152. Flexibility as to punctuality – In respect of disruptiveness if the claimant does not attend punctually that does mean the respondent cannot provide its service to its client if it cannot find someone to provide cover to the claimant until he arrives. The respondent did not present any information on cost.

153. If the person working before the claimant is an employee of the respondent and is able to stay until the claimant arrives (and they have not already worked the limit of hours for a particular day) then there is no disruption.

154. If the person working before the claimant is the client's employee the respondent needs to find another customer service assistant employed at the respondent on that site to provide cover or they will need to ask a supervisor to cover for the claimant (with the supervisor potentially driving there with a pool car).

155. We do accept the respondent's point that the shortness of notice provided by the claimant would cause extra disruption to the respondent's business in providing a service to its clients.

156. The respondent never offered the claimant the option of providing more flexibility on punctuality on the condition that more notice of the claimant's lateness be provided to the respondent. The respondent instead disciplined the claimant both on lateness and shortness of notice in July/ August 2021 and invited the claimant to a disciplinary hearing on 15 November 2021 because of lateness and shortness of notice.

157. Given the above we conclude that it was reasonable for the respondent to be flexible on punctuality on 14 July 2021, 20 July 2021 and on 12 November 2021 (the last instance is within the statutory time limit for bringing a claim).

3.7 Did the respondent fail to take those steps?

158. The respondent did fail to take those steps. They did not engage with the claimant at all to discuss what support they could provide to him in respect of reasonable adjustments.

159. We conclude that the respondent failed to make reasonable adjustments.

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the respondent treat the claimant unfavourably by:

2.1.1 Being invited on 15 November 2021 to a disciplinary hearing

160. We conclude that this was unfavourable treatment because it put the claimant under the stress of attending a disciplinary hearing for lateness on 12 November 2021 when the claimant still had an active final written warning on his personnel file and the potential result of the disciplinary hearing could be his dismissal.

2.1.2 On 2 December 2021 his disabilities were not adequately considered

161. There were two meetings on 2 December 2021. This issue is silent about which meeting it is referring to. We have, therefore, considered both meetings.

162. In respect of the meeting about the claimant's grievance there are no notes, the person conducting the grievance meeting was not present at tribunal to give evidence (Mr Anderson, who has now left the respondent), there are no handover notes from Mr Anderson in respect of the grievance and Miss Hurst (who was also present at the grievance meeting) has not provided evidence about the content of the grievance meeting. Nor has the claimant provided evidence about the content of the grievance meeting. There is, therefore, insufficient evidence for us to conclude that during the grievance meeting the claimant's disabilities were not adequately considered.

163. In respect of the disciplinary hearing on 2 December 2021 we have reviewed the minutes of the meeting [B64-B67] and the claimant's disability and its affect upon him was not discussed in any detail during this meeting.

164. Ultimately the respondent decided not to take further action against the claimant (though the claimant was not informed of this until February 2022) and therefore we have concluded that this was not unfavourable treatment by the respondent.

2.1.3 Managing his performance and attendance (including his punctuality)

2.1.3.1 Not adequately dealing with his grievance raised on 30 November 2021

165. The claimant's evidence is that the outcome letter on 17 March 2022 [B28 – B29] did not address the lack of support that the claimant had raised. Mr Bunting's submission was that the claimant had not raised this in his grievance letter [B57 – B58] to the respondent.

166. We conclude that the claimant did raise a lack of support in his grievance letter because within that letter he states, "*I AM BELIEVE I AM BEING TREATED UNFAIRLY AND FEEL DISCRIMINATED AND COMPLETELY DISREGARDED EVERYTHING THAT I HAVE PUT FORWARD NOT PUTTING ANY MEASURES IN PLACE OR EVEN UNDERSTANDING THE SITUATION".*

167. We conclude that the word "measures" is a reference to support, including adjustments, and the claimant has referred to the respondent not putting any measures in place.

168. In its grievance outcome letter [B28 – B29] the respondent did not address this complaint because the respondent stated that the claimant did not inform the respondent of his medical condition when he first started at the respondent and support would have been put into place at that point. The outcome letter further states that the claimant informed the respondent in March 2021 of his medical condition.

169. This raises the question as to why the respondent did not put support or measures in place in March 2021. In any event the respondent was actually aware

of the claimant's medical condition earlier in August 2020 and also had not provided support or put any measures in place in August 2020 either.

170. We conclude the letter does not address the fact that no support was provided in March 2021 after the claimant detailed his medical condition in the second medical questionnaire. The letter in fact evades this issue.

171. We conclude that the respondent did not adequately deal with the claimant's grievance raised on 30 November 2021 [B57-B58]. We also conclude that this was unfavourable treatment because the claimant's grievance was not upheld.

172. The reference in the claimant's evidence to the grievance outcome letter [B28- B29] not addressing the integrity of the disciplinary hearing was not part of the remit of the grievance because the disciplinary hearing on 2 December 2021 took place after the grievance had been raised on 30 November 2021.

<u>2.1.3.2 On 15 February 2022 being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action</u>

173. Mr Smith emailed the claimant on 15 February 2022 [Supp bundle 62] and informed the claimant that if the claimant was scheduled for shifts and he declined them that "*this will be recorded against you.*"

174. We conclude that this was an indirect threat of disciplinary action if the claimant did not return to work. The email of 15 February 2022 from Mr Smith [Supp bundle 62] was an appalling email given the lack of support for the claimant at that time and that the claimant's grievance was still outstanding.

175. We conclude that this was unfavourable treatment.

<u>2.2 Did the following things arise in consequence of the claimant's disability:</u>

<u>2.2.1 His absence from work</u>

176. The claimant's absence from work between November 2021 and 15 February 2022 (apart from the annual leave from 29 November 2021 to 10 December 2021) did arise in consequence of his disability because the respondent as of February 2022 had not provided any support to the claimant in respect of the claimant's disability nor had it informed itself by obtaining an occupational health report. Nor as of 15 February 2022 was the respondent offering any support to the claimant or any conversation around support.

177. Miss Hurst said the respondent would have had these conversations once the claimant had indicated a willingness to return to work but up until 18 February 2022 the claimant was not on sick leave and had only just been told the result of the disciplinary hearing held on 2 December 2021 on 15 February 2022 and was still awaiting the outcome of his grievance. The respondent should have had a conversation with the claimant about what support it could provide to the claimant prior to Mr Smith's email on 15 February 2022 wanting to reschedule the claimant.

178. The claimant was diagnosed with a mixed anxiety and depressive disorder on 18 February 2022 and his Fit note is dated from 18 February 2022 [Supp bundle 73].

This is the only Fit note in the bundle. No evidence has been presented to the tribunal that there was any indication at that time (18 February 2022) that the anxiety and depression would last indefinitely. The respondent did not refer the claimant to occupational health at this point either.

179. We have considered the offer in the grievance outcome letter (dated 17 March 2022) [B28-B29] that it would be of great benefit for the claimant, his line manager and a member of HR to have a meeting to discuss what support the respondent could give going forward to ensure that the lateness does not occur again.

180. We conclude that the respondent has not offered anything concrete in this letter. The claimant has not been asked to do anything, he has not been asked to contact HR. There is no evidence that the respondent contacted him to arrange this meeting.

2.2.2 His regular lateness

181. Firstly, we noted that between 7 August 2021 (when the claimant received the final written warning) and 12 November 2021 there is no evidence that the claimant was late.

182. The claimant's lateness on 12 November 2021 was because of his attendance at a hospital appointment in respect of his reconstructed bladder. The lateness was in consequence of the claimant's disability. That was not the only reason for his invitation to the disciplinary hearing on 15 November 2021. The respondent was also holding the disciplinary hearing due to the short notice the claimant provided to the respondent that he was going to be late. This second reason was not in consequence of the claimant's dismissal.

2.3 Was the unfavourable treatment because of any of those things?

Invite dated 15 November 2021 to the disciplinary hearing

183. When there are two reasons for the unfavourable treatment applying **Pnaiser** 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.

184. There were two reasons for the invite on 15 November 2021, the lateness per se and the shortness of notice provided by the claimant to the respondent.

185. The decision-makers in respect of inviting the claimant to a disciplinary hearing were not present at the tribunal to give evidence: the author of the JotForm dated 12 November 2021 [B54] (Mr Buckham) and Mr Anderson (who conducted the disciplinary hearing). Miss Hurst was clear that although she was advising Mr Anderson she was not the decision-maker. We are therefore unable to enquire what was in the minds of Mr Anderson and Mr Buckham and their reasons for inviting the claimant to a disciplinary hearing.

186. In this circumstance we have drawn an inference that the lateness was a significant influence on the decision-makers minds and the respondent has not

provided any evidence to prove otherwise. We conclude that the unfavourable treatment was because of the claimant's lateness on 12 November 2021.

Not adequately considering his grievance raised on 30 November 2021

187. This unfavourable treatment was because of the claimant's lateness because the grievance outcome letter [B28-B29] evading the claimant's complaint of no measures being put into place for the claimant was in effect justifying the respondent's decision to invite him to a disciplinary hearing in respect of his lateness (and this lateness was a significant influence as discussed above).

On 15 February being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action

188. This unfavourable treatment was because of the claimant's absence at that point.

<u>2.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:</u>

<u>2.4.1 Efficient running of its business</u>

Invite on 15 November 2021 to the disciplinary hearing

189. The efficient running of its business was a legitimate aim in the context of inviting the claimant on 15 November 2021 to attend a disciplinary hearing due to his lateness on 12 November 2021. The respondent is providing a service to its clients and part of providing that service is that a customer service assistant be present to man the gates at the relevant train station.

Not dealing adequately with the claimant's grievance

190. The respondent's stated aim of the efficient running of its business is not a legitimate aim in this context. Responding to each of the points in a grievance and not evading answering a specific complaint made in a grievance does not prevent the efficient running of the respondent's business.

On 15 February being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action

191. The efficient running of its business was a legitimate aim in the context of requesting that the claimant return to work.

2.5 The tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

Invite on 15 November 2021 to the disciplinary hearing

192. The respondent's evidence was that the respondent would always need to balance the claimant's issues with his bladder against the service it needed to deliver to its clients and the frequency of the claimant's lateness which was high.

193. However, in November 2021 the frequency of the claimant's lateness was not high. There is no evidence of the claimant being late between the final written warning dated 7 August 2021 and 12 November 2021.

194. We conclude that the treatment was not an appropriate and reasonably necessary way to achieve that aim.

On 15 February being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action

195. We conclude the email on 15 February 2022 was not an appropriate and reasonably necessary way to achieve that aim.

196. It contained an indirect threat of disciplinary action if the claimant did not accept the shifts and there had been no discussion prior to this email about what support the respondent could provide to the claimant.

2.5.2 could something less discriminatory have been done instead;

Invite on 15 November 2021 to the disciplinary hearing

197. We conclude that the respondent could have arranged a meeting with the claimant to discuss how best to support the claimant in not being late in the future. In fact, a more concrete version of the very suggestion the respondent makes on 17 March 2022 in its grievance outcome letter [B28-B29] would have been less discriminatory. We conclude that that this would have been less discriminatory.

On 15 February being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action

198. We conclude that holding a return-to-work interview with the claimant in which support for the claimant could have been properly discussed would have been less discriminatory than sending the claimant the email of 15 February 2021.

2.5.3 how should the needs of the claimant and the respondent be balanced?

199. No evidence has been provided by the respondent on balancing the needs of the claimant and the respondent other than that the frequency of the claimant's lateness was high. But in November 2021 the frequency of the claimant's lateness was not high.

200. Given that we have concluded above that the respondent failed to make the reasonable adjustment of being flexible on punctuality we conclude that proportionality has not been demonstrated by the respondent.

On 15 February being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action

201. The respondent has not presented evidence on balancing needs between the claimant and the respondent.

202. We held above that the respondent failed to make the reasonable adjustment of flexibility on attendance.

203. We conclude that proportionality has not been demonstrated by the respondent.

<u>2.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?</u>

204. In submissions the respondent conceded that it had knowledge of the claimant's disability from 2020.

205. We conclude that the respondent subjected the claimant to unfavourable treatment because of something arising in consequence of his disability by:

a. Inviting the claimant on 15 November to a disciplinary hearing.
b. Not adequately dealing with the claimant's grievance raised on 30 November 2021.
c. On 15 February 2022 the operations manager said the claimant had to return to work or there would be further disciplinary action.

4. Harassment related to disability (Equality Act 2010 section 26)

<u>4.1 Did the respondent do the following things:</u>

<u>4.1.1 Being invited on 15 November 2021 to a disciplinary hearing</u>

206. Yes the claimant was invited on 15 November 2021 to a disciplinary hearing.

<u>4.1.2 On 2 December 2021 his disabilities were not adequately considered</u>

207. Yes. There was barely any discussion of his disability and its impact on him in the disciplinary hearing on 2 December 2021 and there was no evidence in respect of what was discussed at the grievance meeting.

<u>4.1.3 Managing his performance and attendance (including his punctuality)</u>

<u>4.1.3.1 Not adequately dealing with his grievance raised on 30 November 2021</u>

208. Yes. We have concluded above that the claimant's grievance was not dealt with adequately.

<u>4.1.3.2 On 15 February 2022 being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action</u>

209. Yes. We have concluded above that the operations manager made an indirect threat of disciplinary action on 15 February 2022.

<u>4.2 If so, was that unwanted conduct?</u>

Invite on 15 November 2021 to a disciplinary hearing.

210. We have concluded that this was unwanted conduct based on the fact and content of the claimant's grievance on 30 November 2021. Within the grievance letter [B57-B58] he states, "*Yet again I am facing disciplinary again*".

211. Did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

212. In submissions Mr Martins said the claimant was relying on either it being the purpose or that it had the effect. In cross-examination the claimant said that for this particular issue it was the respondent's purpose to violate his dignity or create a hostile or intimidating environment for the claimant.

213. The decision makers (Mr Buckham and Mr Anderson) did not attend tribunal to give evidence.

214. There is no evidence of lateness between August 2021 and 12 November 2021 (though there was absence relating to the passing of the claimant's grandmother).

215. Further Mr Anderson said during the disciplinary hearing on 2 December 2021

"*Based on all this why should I keep you in the company"*

216. Miss Hurst agreed it was inappropriate to say that.

217. We infer from the above statement in the disciplinary hearing that it was Mr Anderson's purpose to create a hostile environment for the claimant. The respondent has not provided any evidence to prove otherwise.

Not adequately considering the claimant's disabilities on 2 December 2021

218. In respect of the disciplinary hearing on 2 December 2021 the minutes of the meeting [B64-B67] demonstrate that the claimant's disability and its affect upon him was not discussed in any detail.

219. Ultimately the respondent decided not to take further action against the claimant (although the claimant was not informed of this until 15 February 2022).

Even if the non-consideration was unwanted we have concluded that it was not Mr Anderson's purpose to harass the claimant. The minutes [B64-B67] demonstrate that the claimant refers Mr Anderson to the claimant's medical questionnaire and then the result of the meeting is no further action. Nor is it reasonable for the non-consideration to have had the effect to harass the claimant.

Inadequate consideration of grievance

220. The claimant in his evidence has not expressly stated that this was unwanted but clearly by raising the grievance in the first place the claimant would want everything within in it to be adequately considered and therefore the respondent considering it inadequately was unwanted conduct.

221. Did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

222. In submissions Mr Martins stated the claimant was relying on both in the alternative.

223. Again, Mr Anderson was the decision-maker and he was not present at tribunal to give evidence.

224. We conclude given Mr Anderson's statement in the disciplinary hearing, "*Based on all this why should I keep you in the company*" that Mr Anderson's inadequate consideration of the claimant's grievance did have the purpose to create a hostile environment for the claimant.

225. If we are wrong on that, we conclude that it had that effect on the claimant and it was reasonable to have that effect given the events between the claimant raising the grievance on 30 November 2021 and him receiving the outcome grievance letter on 17 March 2022 [B28-B29].

On 15 February being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action

226. The email from the claimant on 15 February 2022 in response to Mr Smith's email [Supp bundle 62] demonstrates that it was unwanted.

227. Did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

228. The person who wrote the email, Mr Smith, did not attend tribunal to give evidence. We were therefore unable to enquire what was in his mind. Mr Smith was attempting to convince the claimant to attend work but then made an indirect threat of disciplinary action. We infer that it was Mr Smith's purpose to create a hostile and intimidating environment for the claimant. The respondent has not put forward any evidence to prove otherwise. We conclude that it was Mr Smith's purpose to create a hostile and intimidating environment for the claimant.

229. If we are wrong about that it had that effect on the claimant. This is demonstrated by emails the from claimant to Mr Smith in February 2022 [Supp bundle 62 and Supp bundle 72]. It was reasonable to have had that effect given the indirect threat in Mr Smith's email on 15 February 2022.

4.3 Did it relate to disability?

Invite on 15 November to attend a disciplinary hearing

230. On 12 November 2021 the claimant was late to work because of an hospital appointment for his bladder (the claimant's disability is his reconstructed bladder) and this lateness was one of the reasons for inviting the claimant to the disciplinary hearing.

231. We conclude that the harassment was related to disability.

Inadequate consideration of grievance

232. We conclude yes, because in the claimant's grievance letter [B57-B58] the claimant was complaining about the lack of measures to assist him (in respect of his disability) and that instead he was being disciplined for lateness.

On 15 February being approached by the Operations Manager who said he had to return to work or there would be further disciplinary action

233. Mr Smith knew about the claimant's disability.

234. No support had been provided or offered by the respondent as of 15 February 2022 in respect of the claimant's disability and Mr Smith made an indirect threat because of the claimant's absence. We conclude that this instance of harassment was disability related.

235. We conclude that the respondent subjected the claimant disability-related harassment by:

a. Inviting the claimant on 15 November to a disciplinary hearing.
b. Not adequately dealing with the claimant's grievance raised on 30 November 2021.
c. On 15 February 2022 the operations manager said the claimant had to return to work or there would be further disciplinary action.

5. Remedy

<u>5.1 Should the tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?</u>

236. The claimant is still employed by the respondent.

237. We, therefore, recommend that within 6 months of the date on which this judgment is sent to the parties that all the managers at the level of station manager and above and the entire HR department at the respondent undertake training regarding disability discrimination in the workplace and how to eliminate it. To facilitate this, we recommend that within 1 month of the date on which this judgment is sent to the parties the Head of HR at the respondent consult with the Equality and Human Rights Commission regarding where they might secure such training.

<u>5.2 How much should the claimant be awarded?</u>

<u>What financial losses has the discrimination caused the claimant?</u>

238. The claimant's financial losses flow from the respondent's failure to make the reasonable adjustment in respect of punctuality on 12 November 2021 because this put the claimant into the position that he was not able to work shifts for the respondent without being under constant risk of being disciplined for his lateness.

239. No evidence has been presented by the respondent to the tribunal that any serious attempts were made by the respondent between 12 November 2021 and 18 February 2022 (the date the claimant was signed off as being unfit for work) to organise a meeting to discuss what support it could provide the claimant and what measures it could put into place. Though we note there was a period of time when the claimant was on annual leave during this period from 29 November 2021 to 10 December 2021. We have no evidence that this was paid annual leave.

240. There was a reference in the grievance outcome letter [B28-B29] that it would be of benefit to organise a meeting with the claimant to discuss support but nothing concrete was proposed by the respondent. Regardless of the claimant informing the respondent that he was bringing a claim in the Employment Tribunal the respondent still should have taken concrete steps to organise a meeting with the claimant.

241. On 18 February 2022 the claimant was diagnosed with mixed anxiety and depressive disorder and from 14 March 2022 with generalised anxiety disorder. No evidence was presented to the tribunal that the respondent referred the claimant to an occupational health provider to gain more information about the prognosis for these mental health issues to assist the respondent in supporting the claimant to return to work.

242. Mr Bunting referred to the claimant's obligation to take reasonable steps to mitigate his loss. But it is for the respondent to prove with evidence that the claimant has failed to do so. No evidence has been presented to the tribunal on this point and there were no submissions about how the claimant has failed to mitigate his loss.

243. We have, therefore, decided to award the claimant loss of earnings for 30 months. Because the amount of the claimant's salary means that his annual salary does not exceed his personal allowance for tax we have calculated the financial losses using his gross monthly figure.

<u>What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?</u>

244. In the claimant's schedule of loss, the claimant has claimed £35,000. In submissions Mr Martins said a figure in the middle band of Vento was appropriate. The schedule of loss specifies that the claimant's injury to feelings is due to poor treatment by Mr Smith, Mr Anderson, Mr Reed and Mr Haynes.

245. Mr Bunting submissions were that no injury to feelings award should be made because the claimant has not proven it.

246. The claimant's witness statement does refer to mentally suffering due to what he has said above in his statement which includes the failure to address the lack of support raised in his grievance, the adjustment failures and the harassment.

247. The medical evidence (GP letter in March 2024 [Supp bundle 82-82]) states on 18 February 2022 the claimant was diagnosed with mixed anxiety and depressive disorder and from 14 March 2022 with generalised anxiety disorder. The first diagnosis was made very soon after Mr Smith's email on 15 February 2022 and the second diagnosis was made while the claimant was still awaiting the outcome of his grievance from Mr Anderson. These diagnoses are clearly concurrent with at least one of the acts of disability related discrimination and disability related harassment that we found above. This raises an inference that these mental health issues were as a result of the discrimination suffered by the claimant and the respondent has not shown otherwise.

248. We consider the appropriate award to be in the middle Vento band. We award £25,000 for injury to feelings due to the mental health conditions the claimant suffered with in February and March 2022.

Has the discrimination caused the cl personal injury and how much compensation should be awarded?

249. The schedule of loss specifies damages for personal injury of £25,000.

250. The claimant has not presented any evidence about this personal injury other than the diagnoses referred to above but this insufficient to make an award of personal injury or to determine the amount of any such award.

251. The psychiatric injury, its severity and the prognosis must be evidenced before a tribunal can make an award for personal injury. The brevity of the claimant's witness is insufficient on this head of damages.

252. No award is made for personal injury.

Should interest be awarded? How much?

253. Due to the length of time that has passed since the discrimination and the final hearing we award interest at 8% on those heads of loss arising under the EQA.

254. On the award for injury to feelings, we have calculated this from the date the claimant was invited to attend the disciplinary hearing on 15 November 2021, until the last day of this hearing, 7 June 2024, a period of 937 days.

255. On the award for past financial losses, we have calculated this from the mid-point between 15 November 2021 and the last day of this hearing, 7 June 2024, which is a period of 469 days.

Calculation

(1) Past loss of earnings	
15 Nov 2021 to 7 June 2024 (30 months)	
30 x £860 =	£25,800
(2) Interest on past loss of earnings	
£25,800 x (469/365) x 8%=	£26252.10
(3) Injury to feelings	£25,000
(4) Interest on injury to feelings £25,000 x (937/365) x 8%	£5134.24
Total	**£58, 586.34**

Employment Judge Macey
Date: 25 June 2024

Sent to the parties on
Date: 19 July 2024