EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Singh	v	Royal Mail Group Ltd

Heard at: Reading
On: 1, 2, 3, 4, 5, 8, 9, 10 and 15 July 2024

Before: Employment Judge Hawksworth
Ms A Crosby
Ms HT Edwards

Appearances:
the claimant: represented himself
Punjabi interpreter: Mrs H K Lamba
for the respondent: Mr R Chaudhry (solicitor) (1-10 July 2024)
Ms K Hall (legal director) (15 July 2024)

JUDGMENT

The unanimous decision of the tribunal is that:

1. The complaints of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and disability-related harassment fail and are dismissed.

2. The complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Claims, hearing and evidence

1. The claimant was employed by the respondent in an Operational Postal Grade from 10 July 2012 until his dismissal on 16 March 2021.

2. The claims concern the claimant's ill health absences, restricted duties, and his dismissal under the respondent's policy 'Leaving the business due to ill health'. The claimant complains of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, disability-related harassment and unfair dismissal.

3. The claimant presented two claims which are being heard together. The first claim was presented on 28 March 2020, before the claimant was dismissed. The second claim was presented on 18 August 2021, after the claimant's dismissal. The respondents defend the claims.

4. The hearing was originally due to take place over 11 days from 1 July to 15 July 2024. For judicial resourcing reasons, the hearing did not go ahead on 11 or 12 July 2024. We were able to complete the hearing and give our judgment and reasons within the reduced hearing time.

5. The hearing was a hybrid hearing. Three witnesses gave evidence by video link (CVP). Everyone else was present in the hearing room, except that on the final day of the hearing, when the tribunal was giving judgment and explaining its reasons, everyone attended by video.

6. Interpretation for the claimant was provided by Mrs Lamba, Punjabi interpreter. We are grateful to her for her assistance. For the majority of the hearing, Mrs Lamba interpreted all that was said. For some parts the claimant said he would prefer to speak in English and ask Mrs Lamba for assistance as and when required. We told the claimant that it was fine for him to choose the approach he preferred at any point. We checked with the claimant from time to time that he was happy with the approach he had chosen. We emphasised that Mrs Lamba was available and that she could interpret the whole hearing or as needed, whatever the claimant found most helpful.

7. At the start of the hearing, the respondents' representative provided a chronology and reading list. It was not an agreed chronology. The claimant said that it did not include all pages references and some points were missing. We explained to the claimant that the chronology was not intended to include everything. We noted the point the claimant said was missing (about the two sitting roles); it was discussed in detail in the evidence.

8. The claimant prepared a note listing some concerns about preparations for the hearing. We discussed this with the parties. Witness statements had been exchanged on 24 June 2024. The claimant said he was not asking for the hearing to be postponed because he had taken time off work and would like to go ahead. We said that the claimant could ask us if he needed any additional breaks, and that we would take into account what he had said when deciding the timetable for the hearing.

9. We discussed the timetable with the parties and produced a written timetable which was handed to the parties and agreed by them. The timetabling of the respondent's witnesses took into account the concerns the claimant had raised. We explain this below. We are grateful to the claimant and the respondent's representative for their assistance in keeping to the timetable we agreed.

10. The parties had prepared a bundle of documents with 816 pages. One page was added as page 817 at the start of the hearing (Mr Shamraiz's leave calendar). Some documents relating to another person had been included by mistake in the bundle. The respondent's representative apologised for this.

He said he thought they had now all been removed. We did not come across any of these documents during the hearing.

11. We took the first day and the morning of the second day to deal with these preliminary matters and for reading the claim form, response form, the record of the preliminary hearing, and the witness statements.

12. We started hearing witness evidence at 12.00 on the second day of the hearing, 2 July 2024. All the witnesses had produced and exchanged witness statements.

13. We heard evidence from the claimant on 2, 3 and 4 July. The claimant's witnesses were his wife, Sandra Gil, and Prabhdeep Singh, a former manager with the respondent. Mrs Gil gave evidence by video link (CVP) on 3 July. For witness availability reasons, we paused the claimant's evidence to allow her to give her evidence. Mr Prabhdeep Singh gave his evidence on 4 July, after the claimant's evidence.

14. We heard from six witnesses for the respondent. On 4 July we heard from Mike Robertson (by CVP) and Mohammed Shamraiz. On 5 July we heard from Darren Miller and Mohammed Iqbal. On 8 July we heard from Daniel Tovey and Jai Rooprah. We arranged this part of the timetable by having two respondent's witnesses on each day, one with a shorter statement with one with a longer statement. We kept the respondent's witnesses in chronological order of events. These steps were to help the claimant in his preparations for asking questions of the respondent's witnesses.

15. We had the closing comments part of the hearing on 9 July. Mr Chaudhry produced written closing comments documents which were sent to the tribunal and the claimant at 9.00am. The hearing started at 12.00 after time for interpretation of the document for the claimant. Both Mr Chaudhry and the claimant made spoken closing submissions.

16. The tribunal deliberated on the afternoon of 9 July and on 10 July. There was no hearing 11 and 12 July. On 15 July 2024 we told the parties our judgment and gave our reasons for our decision, explaining our findings of facts and the conclusions we reached having applied the relevant legal principles to those facts.

17. The claimant asked for written reasons.

The issues

18. The issues for us to determine were first identified at a preliminary hearing on 3 November 2022. The list produced at that hearing had some gaps for further information to be supplied by the parties. An updated list was produced. It was at page 125 of the bundle of documents for this hearing and is included in the appendix to these reasons.

19. We discussed the issues with the parties at the start of the hearing. The parties agreed that the updated list contains the issues for us to determine.

20. We decided that because the claimant's schedule of loss included career losses and an element of compensation for personal injury in respect of which a medical report might assist, this hearing would deal with liability only. Another hearing would be arranged to decide remedy if needed.

21. In the course of the claimant's evidence, it became clear that there had been a misunderstanding between the parties about a point in the list of issues (paragraphs 7.6 and 21.6). The reference in those two paragraphs to two sitting roles which were potentially alternative roles for the claimant had been understood by the respondent to be referring to resource/admin roles. However, the claimant said in his evidence that he was referring to two coaching roles. We allowed this clarification, subject to permitting Mr Chaudhry to ask two of the respondent's witnesses (Mr Shamraiz and Mr Miller) short supplemental questions about the coaching roles.

Findings of fact

22. We make these findings of fact by reference to the evidence that we heard and read. Where there is no dispute between the parties, we do not need to make a decision, but where the parties disagree about what happened, we have to decide what we think is most likely to have happened. This section of the judgment explains what we have decided happened in the claimant's case.

23. The claimant's continuous employment with Royal Mail began on 10 July 2012 (page 136). From 29 June 2015 the claimant began employment under a long-term contract as an Operational Postal Grade (OPG) employee.

24. The role included manual sorting of letters onto rolling metal containers called York containers, manual loading and unloading, moving the York containers and manually clearing up sorting areas. The role was 5 days a week and 8 hours a day, with a 40 minute lunch break. Staff were also allowed a 20 minute grace period which was usually taken at the end of the shift, enabling an early finish.

25. At times the claimant took on additional management responsibilities. In 2015 he had a period as Acting Deputy Manager.

<u>Sickness absence in 2017</u>

26. The claimant had a period of sickness absence between 22 July 2017 and 11 October 2017. He was referred to Occupational Health. On 2 October 2017 the advisor recorded that the claimant had pain throughout his body and fatigue, having developed sudden and severe symptoms, and that he was unfit for work in any capacity (page 635).

27. The claimant returned to work on 11 October 2017 but started another period of sick leave on 10 November 2017. He was referred to Occupational Health again. The report was sent on 30 December 2017, a month after the referral (page 643). The report said it was unlikely that the claimant would be able to return to work in any capacity unless his symptoms significantly improved

(page 644). The report made no comment on whether the claimant's illness was likely to be considered a disability under the Equality Act.

28. On 6 February 2018 another OH report was provided. The report said that symptoms had developed in July 2017. It said that the claimant's symptoms had improved slightly following treatment in India and that he would be fit to return to work on modified duties. A rehabilitation plan was set out in the report, with a six week phased return building up to full duties in week seven (page 645). The report said that, in the advisor's opinion, the claimant's condition did not amount to a disability, but that if 'he gets to' 12 months it would be likely to apply.

Rehabilitation plan in February 2018

29. The claimant returned to work in February 2018 on the recommended rehabilitation plan. It was intended that he would return to his regular role as an OPG after seven weeks but the claimant found the transition back to that role challenging and painful, and it was not possible for him to return to his full duties.

30. We find that Mike Robertson, who was the claimant's shift manager at the time, found alternative duties during 2018 which the claimant was able to undertake. We find that the amended duties continued until June 2019. The duties were scanning parcels with no heavy lifting tasks. We have made this finding based on the document recoding a return to work meeting on 14 June 2019 after a short absence (page 272). At that time the claimant said that he did not require any changes to these amended duties which were in place to support his health related issues.

Resources role – issues 7.5 and 21.5

31. The claimant said that in the period between Spring 2018 and July 2019, after his rehab duties finished, he specifically asked for a role in the resources or admin section. This section is a desk based department responsible for employee matters.

32. In his evidence the claimant said he had been given a gentleman's promise that if a role came up in that section he could have it. He later became aware that in November 2018 a colleague had been given a role in that section without him being informed of the vacancy or given any opportunity to apply or express an interest (issues 7.5 and 21.5).

33. There was no record of any discussion between the claimant and any manager prior to 2019 in which the claimant asked for a resources or admin role, or in which any promise of any such a role was made. At this time there was no recommendation from OH that the claimant required a sitting role or a role in resources. Although he referred to it in his evidence, the claimant did not mention any such request or promise being made prior to 2019 in his witness statement.

34. We find that no such promise was made. We find that the colleague who was placed in the resources section in November 2018 also had a disability and that she was placed there as a reasonable adjustment after a formal process in which she was supported by her union.

35. We also find that there was no vacancy in the resources section in the location where the claimant worked at any material time.

Change of managers in late 2018/2019 – issues 25.4, 25.5 and 25.6

36. Mr Robertson was redeployed towards the end of 2018 and Darren Miller took over as shift manager. The claimant's work area manager was Mohammad Shamraiz.

37. The claimant alleges that Mr Shamraiz made two comments on 2 April 2019 which were disability related harassment: first, telling the claimant in front of all the staff to go and 'cut and tip', and secondly, making comments about the claimant's jacket and asking why he felt cold (issues 25.4 and 25.5).

38. We find that these incidents cannot have happened on 2 April 2019 because Mr Shamraiz was not at work on that day. We find, based on a note of a conversation between the claimant and an advisor from the Employee Relations Team in September 2019 (page 306) that the following happened:

    38.1 in May or June 2019 Mr Shamraiz asked the claimant to go on the tipping belt but the claimant said he was unable to do that because he could not pick up heavy items;

    38.2 at the end of June 2019, Mr Shamraiz asked the claimant something along the lines of "Why are you wearing a jacket? Are you cold?"

39. We find that the claimant found these comments upsetting, and that they had the effect of creating a hostile environment for him. We return in our conclusions to whether it was reasonable for them to have done so.

40. The claimant also alleged that on 23 May 2019 Mr Shamraiz checked on the claimant in the washroom and made comments to him that he had been away from work for a long time, and that he was monitoring how much time the claimant was spending and where (issue 25.6).

41. We find that this did not happen. There is no record that this allegation was raised by the claimant in the informal meeting with his shift manager and trade union representative which took place the following day, or in the conversation on 10 September 2019 which took place about four months later and which was specifically to discuss the allegation that Mr Shamraiz had been picking on the claimant. We have decided that if this had happened, the claimant would have mentioned it, in one or both of those meetings.

Meeting on 24 May 2019 – issues 7.1 and 21.1

42. On 24 May 2019 the claimant had an informal meeting with his union representative and Mr Miller at which he asked for additional breaks to sit down if he was in pain. Mr Miller did not agree to extra breaks but said that the claimant would be permitted to split his 40 minute meal break and 20 minute grace period into smaller breaks which he could take as and when required. Mr Shamraiz joined the meeting at the end and Mr Miller explained this arrangement.

43. We find that an agreement that the claimant could take split breaks was reached. We make this finding based on a later email which records the claimant's union representative's confirmation that there was an agreement for split breaks, not additional breaks (page 282).

44. The claimant wanted to take sitting down breaks in addition to meal breaks and the grace period. He was unhappy that some colleagues took additional breaks: tea breaks, water breaks, smoking breaks and prayer breaks. The refusal by Darren Miller to allow the claimant additional breaks is the allegation at issues 7.1 and 21.1.

45. We find that staff were allowed to take tea breaks, water breaks and smoking breaks. The intention was that these breaks would be taken out of the meal break time, but this was at the manager's discretion. We find that additional breaks were being allowed without deduction of time from the meal break, and that at the start of 2019 Mr Miller asked managers to stop this practice. We find that prayer breaks were treated differently.

46. We find based on the evidence of Mr Prabhdeep Singh that the claimant himself took tea breaks and water breaks.

Request for referral to Occupational Health: issue 25.7

47. The claimant said that on 4 June 2019 Mr Shamraiz refused to refer him Occupational Health for an updated report (issue 25.7).

48. The claimant had a week's absence for body pain, returning to work on 14 June 2019 (page 272). A return to work meeting took place with Mr Shamraiz. The claimant said he was still struggling with body pains and fever.

49. We find that Mr Shamraiz did not on 4 June 2019 refuse to refer the claimant to Occupational Health, because Mr Shamraiz was on leave on that day. We also find that there was no refusal to refer the claimant on another day around that date.

50. We make this finding because the respondent had referred the claimant to occupational health on several previous occasions, and there was no reason to think they would have refused on this occasion. Also, we think that if the claimant had asked to be referred to occupational health, his request would have been mentioned in the return to work meeting on 14 June 2019. That would have been an obvious point at which to discuss this request if it had been made at around this time.

Counting and monitoring work: issues 7.2, 7.3, 21.2, 21.3, 25.1, 25.2, 25.8, 25.9 and 25.10

51. The claimant made a number of allegations that on 26 June and 7 July 2019 Mr Shamraiz counted the volume of work the claimant was doing, deliberately monitored and micro-checked his work, and that on 26 June 2019 Mr Shamraiz said to him, "Only this much work that you've done until now" (issues 7.2, 7.3, 21.2, 21.3, 25.1, 25.2, 25.8, 25.9 and 25.10).

52. The claimant was not at work on 7 July so these things cannot have happened on that date. As to whether they happened on 26 June or on another day, we find that they did not. We accept the evidence of Mr Shamraiz that it was not possible for him to carry out this kind of counting of work or monitoring. Performance was measured on a team basis and not an individual basis. The scope of responsibilities required for Mr Shamraiz's role did not permit him to undertake monitoring of individual employees. We find that Mr Shamraiz would not have had sufficient oversight of the amount of work the claimant was doing to make the comment the claimant alleged he made.

The request for a break to recover from a headache – issues 7,4, 21.4 and 25.3

53. On 9 July 2019 the claimant developed a severe headache while at work. He told Mr Shamraiz that he was going to take a tea break. Mr Shamraiz asked how long he would like the break for, and how he was going to adjust his meal break to take it into account.

54. The claimant said he would not be giving the time back from his meal break because he needed it for his health condition. The claimant said he was going to go and speak to his union representative. After the claimant left Mr Shamraiz spoke to the claimant's union representative who told him that the claimant was going home. In fact, the claimant waited in the car park and returned about 30-45 minutes to complete a part-day absence form (page 282). A refusal to allow a break is the allegation at issues 7.4, 21.4 and 25.3.

55. We find that Mr Shamraiz's response to the claimant's request for an additional break to recover from a headache had the effect of creating a hostile environment for the claimant. We return in our conclusions as to whether it was reasonable for it to have had that effect.

56. The 9 July 2019 was the first day of a long period of sickness absence by the claimant which ended over a year later on 1 October 2020 (451 days). During this time the claimant's GP did not suggest any adjustments that could be made to assist the claimant to return to work.

Line manager during the claimant's sickness absence – issue 25.18

57. At the start of this period of sickness absence the claimant was managed by Mr Shamraiz. Mr Shamraiz was promoted and moved to a different area in August 2019. Mr Rooprah took over as the claimant's line manager. Mohammad Iqbal, a late shift manager, also had some involvement in managing the claimant's sickness absence.

58. The claimant said that he did not have a single point of contact during his sick leave period from 9 July 2019 to early 2020 (issue 25.18). In his evidence, the claimant said that a long-term sickness manager should have been appointed for him. We accept Mr Rooprah's evidence that a practice of appointing a long-term sickness manager was not in place at this time. It was not referred to in the Managing Long-term Absence Policy which applied at the time (page 201).

The claimant's sick pay being stopped – issue 25.11

59. The respondent kept in contact with the claimant during his sickness absence. The claimant notified a change of address in 2018 and the respondent's systems were updated. However, in August 2019 the respondent made a mistake with its correspondence to the claimant. Mr Shamraiz sent a letter to the claimant about his sickness absence. He took the claimant's address from an old document rather than from the system. It was the claimant's previous address, and so it did not reach the claimant.

60. When the claimant did not reply to the respondent's wrongly addressed correspondence, Mr Miller decided that the claimant was being uncooperative and stopped his sick pay from 23 August 2019 (issue 25.11). This was particularly difficult for the claimant as he had a young baby at home. The claimant made a complaint about this on 3 September 2019 and the respondent accepted their error. The claimant's pay was reinstated on about 3 September and he received back pay.

Sickness review meeting on 3 September 2019 - issues 25.12 and 25.13

61. A formal sickness review meeting was due to take place with Mr Iqbal on 3 September 2019. The claimant attended the workplace with his union representative. No meeting room was available so the claimant had to wait in the canteen for 40 minutes. After 40 minutes the meeting room was still unavailable. Mr Iqbal told the claimant that the meeting would not take long and the claimant agreed that the meeting could go ahead in the canteen. The are the factual allegations in issue 25.12.

62. During the meeting, Mr Miller saw the claimant and came over. He apologised to the claimant for wrongly stopping his pay. He asked the claimant whether he was working as an Uber driver (another employee had told Mr Miller that he thought the claimant might be). The comments made are the allegations in issue 25.13.

63. The claimant denied that he was working as an uber driver. He was very unhappy that it had been raised by Mr Miller in the canteen. After the meeting the claimant wrote complaints against Mr Miller and Mr Shamraiz (page 304 and 305).

Bullying and harassment complaint against Mr Shamraiz – issue 25.14

64. The claimant submitted his complaint against Mr Shamraiz under the respondent's bullying and harassment procedures. On 10 September 2019

an advisor from the Employee Relations Case Management Team called the claimant to get more details about the complaint. After their discussion she wrote to the claimant on 11 September 2019 to say that the complaint would not be accepted for formal investigation because it was a concern that focussed on the reasonable adjustment which had been implemented, that is the option of splitting breaks (page 308). The claimant said that his complaint was ignored and not properly addressed (issue 25.14).

The claimant's grievance against Mr Miller – issue 25.17

65. The second complaint the claimant made on 3 September 2019 was a grievance against Mr Miller in relation to his decision to stop the claimant's pay from 23 August and the comments he had made in the canteen (page 305). The claimant says the respondent unduly delayed acknowledging or acting on his grievance (issue 25.17).

66. After the claimant wrote his grievance against Mr Miller, he gave it to his union representative who passed it on to the respondent's managers. Ken Coke was appointed to hear the grievance. Mr Coke wrote to the claimant to arrange a meeting, and then wrote again on 10 October 2019 to reschedule the meeting (page 814). We jump ahead a bit in the chronology at this point to explain what happened with the claimant's grievance.

67. The claimant and his union representative met with Mr Coke on 21 October. Mr Coke's decision was sent to the claimant on 31 December 2019 (page 815). Mr Coke upheld two of the claimant's complaints but did not uphold the third. He agreed that the claimant's pay should not have been stopped and that Mr Miller should not have commented about Uber driving on 3 September. The respondent's policy provided that the resolution should be completed within 5 to 28 calendar days (page 180). Mr Coke's decision was sent later than that, in fact it was sent over two months after the meeting with the claimant.

68. The claimant appealed Mr Coke's decision. Daniel Tovey was appointed Appeal Manager. He met with the claimant and his union representative on 24 February 2020. This was shortly before the first national lockdown for covid on 23 March 2020. Mr Tovey also met with Mr Miller but was unable to do so until 12 June 2020. This delayed the appeal outcome; it was sent to the claimant on 16 July 2020 (page 809).

69. Mr Tovey upheld the claimant's grievance in relation to pay being stopped and Mr Miller attending the absence meeting. He acknowledged that it was not appropriate to address the claimant while he was meeting with another manager. Mr Tovey also partially upheld the third point: he said it was right for Mr Miller to ask a question about Uber driving but said he should not done so during a different manager's absence meeting.

70. When Mr Tovey met with Mr Miller in the course of the appeal, he discussed learning points with him (page 340). Mr Tovey followed this up with recommendations to Mr Coke of three learning points to be addressed

including recommendations for Mr Miller to be reminded of leadership behaviours (page 346).

71. The respondent did not take any steps in relation to the allegation that the claimant had been working as an uber driver.

Sickness review meetings in October 2019 and February 2020 – issues 25.15 and 25.16

72. We return to the chronology of events. The claimant was still on sick leave in September 2019 and had been referred to Occupational Health, resulting in a report dated 27 September 2019 (page 656). The report said that the symptoms the claimant was experiencing were similar to those he had in February 2018 and that possible diagnoses at that time were fibromyalgia or rheumatoid arthritis. The advisor's option was that the claimant had symptoms similar to fibromyalgia or rheumatoid arthritis and that he needed to pace himself with regular breaks. The report advised that the claimant would be considered disabled by joint pain under the Equality Act.

73. The claimant attended a sickness review meeting with his trade union representative and Mr Iqbal on 15 October 2019. The meeting was to go through the recent report from occupational health. The claimant disagreed that he had fibromyalgia or rheumatoid arthritis but confirmed that he had severe pain in his left side.

74. The claimant said that in this review meeting Mr Iqbal questioned whether he had the medical conditions described in the report (issue 25.15). We find that the claimant misinterpreted this discussion. Mr Iqbal was not suggesting that the claimant was lying about his health issue. He was not doubting the claimant, rather he was going through the Occupational Health report and seeking information from the claimant about it. He was asking about the possible diagnoses which had been referred to in the report.

75. At this time the claimant was having counselling via Occupational Health funded by the respondent. Two further Occupational Health Reports were produced on 17 October 2019 and 5 December.

76. Another absence review meeting between the claimant and Mr Iqbal took place on 12 February 2020. The claimant attended with his union representative. We find that in the meeting Mr Iqbal asked the claimant if he could suggest some action plan or type of work to enable him to return. The claimant said he was not fit to return to work and his GP would advise when he next saw them.

77. We make this finding based on Mr Iqbal's contemporaneous note of the meeting (page 262). The claimant alleged that in this meeting, Mr Iqbal said there was no plan for him to return to work (issue 25.16). We find that Mr Iqbal did not say this, because it is not plausible given the nature of this meeting which was to try and help the claimant back to work. We think the claimant's allegation is likely to be based on a misunderstanding.

OH referral – issue 25.19

78. In May 2020 the claimant was still on sick leave. Mr Miller asked the claimant to consent to another Occupational Health referral. The claimant said he would consent to a referral but not for the purposes of considering ill-health retirement (page 577). The claimant said that on an earlier date the respondent had referred him to Occupational Health for consideration of ill-health retirement without any consultation with him (issue 25.19). There was no evidence of this.

79. Mr Miller agreed not to include a question on ill-health retirement and the referral went ahead. An Occupational Health report was produced on 8 June 2020. That report said that the claimant was not fit for full normal duties but could perform a sitting down role. It said that if no sitting down roles were available a further referral should be made after treatment.

A search for a suitable seated role

80. After the recommendation that the claimant could perform a sitting down role, the claimant's managers began a process of liaising with the claimant and trying to identify a suitable role for him to return to.

81. On 10 June 2020 Mr Miller contacted the claimant by WhatsApp. He asked whether the claimant was willing to return to work on sit down duties (page 578). The claimant said he could perform a resource or admin role.

82. After some other exchanges, on 29 June Mr Miller asked the claimant whether he would consider an e-prime letter sorting role. This was a seated role which involved taking light parcels from a waist height container called a mini York, scanning them and putting them into another mini York. Mini York containers have a weight-pressured base so that as the parcels are removed the base of the container lifts. This means that it is possible to do the role seated and with limited bending. No heavy lifting is involved.

83. The claimant replied asking for confirmation in writing that the role was a fully sitting job and in compliance with Atos feedback. Mr Miller replied, "Yes sure". He asked the claimant to come in for a face to face meeting so that it could all be written up (page 583).

84. In his evidence to us the claimant suggested that this request for written confirmation amounted to acceptance of this role by him. We find that the claimant did not accept this role. We reach this finding because acceptance of the role is not consistent with the subsequent discussions between Mr Miller and the claimant, where other roles were discussed and the claimant did not at any point say that he had already accepted a role (page 583 and 361 for example).

85. On 6 and 8 July Mr Miller and the claimant communicated by email. Mr Miller offered the claimant two temporary seated roles: logging scanners (PDAs) and scanning labels (page 361). The claimant said he was unable to accept because of his health.

Further Occupational Health reports and other medical evidence

86. There was a further referral to Occupational Health with a report dated 23 July. The report said the claimant was unable to manage even with adjustments and recommended that advice be sought from an occupational physician (page 684).

87. The Occupational Physician's report was dated 11 August. It said that the claimant was unfit for his substantive role or for any sitting role involving reaching, like sorting. It recorded that the claimant felt he could only do an office based role. A report was requested from the claimant's GP (page 689).

88. At the end of August 2020 the claimant had medication injected into his back and reported a gradual decrease in the severity of back pain. Further medical evidence, including copies of specialist reports, was provided to occupational health. A further occupational health report was provided to the claimant's managers on 25 September 2020 (page 702). This report said that the claimant would be able to start a phased return to work with temporary reasonable adjustments within two weeks.

The claimant's return to work in October 2020

89. The claimant's phased return to work started on 2 October 2020. He was in an e-prime scanning role. The claimant started on two hours a day. A gradual increase of hours was planned but the claimant found the increase to three hours a day was difficult (page 372).

90. On 23 October the claimant emailed the respondent to say that he was willing to consent to ill-health retirement. He asked the respondent to start the procedure (page 385). Mr Rooprah replied, saying that the respondent was not in a position to make decisions about ill-health retirement as the rehabilitation plan the claimant was currently on was a positive step to return to work. He said another occupational health appointment was coming up and they would review the position again on receipt of the next report (page 384).

91. On 28 October 2020 Mr Miller emailed the claimant to summarise the roles that had been offered to him but not accepted, including: terminal dues, e-prime sorting, sit down scanning, UPU labels and signing in and out PDAs. Mr Miller asked the claimant to say if he was now able to do these roles or if there was any other role on the operational floor he felt able to carry out. He confirmed there were no roles available in the resource team. He said that as the claimant was currently doing a rehabilitation plan, ill-health retirement would be unlikely, but he would seek advice about it from HR (page 383).

92. In the next report on 28 October, Occupational Health noted that the claimant was struggling with the rehabilitation plan and recommended a referral to an occupational therapist (page 709). Mr Miller emailed the claimant suggesting other roles and asking him to confirm whether he could physically perform them. He said that ill-health retirement would not be progressed pending the occupational therapy assessment (page 382).

93. On 4 November 2020 the claimant started another period of sickness absence form which he did not return prior to his dismissal.

94. The respondent received the report from the occupational therapist. It was dated 9 December (page 717). It concluded that the claimant was not fit to return to processing duties and it was unlikely that he would be able to do so because his symptoms had not improved in over 12 months. A scoping exercise for a desk based administrative role was recommended.

Formal scoping exercise

95. The respondent carried that out the recommended scoping exercise between 13 January and 11 February 2021. The process started with a meeting with the claimant at which a scoping form was completed. The claimant said he was looking for a full time admin role, Monday to Saturday, late shift only, within the Slough or Langley vicinity. The geographical limitation meant that only three locations were suitable. The claimant and his union rep made clear however that ill-health retirement was the preferred option (page 405).

96. The respondent's managers contacted managers across the three sites to ask if suitable roles were available; none were available. Mr Miller had already confirmed that there were no suitable roles within the claimant's own department.

97. On 10 February 2021 the claimant attended a scoping meeting with Mr Miller and Mr Rooprah at which it was noted that no suitable opportunities had been identified. Copies of the email responses from different departments were given to the claimant.

Dismissal

98. On 26 February 2021 the respondent received another report from occupational health (page 725). It said that the claimant's condition had become long-term with no foreseeable return date. The claimant qualified for the respondent's 'leaving the business due to ill-health' scheme with a lump sum. He did not meet the criteria for income support because he was able to do a sedentary role (page 726).

99. On 3 March 2021 Mr Rooprah invited the claimant to a meeting to discuss consideration of dismissal on grounds of ill-health. He provided the claimant with details of the payments he would be entitled to on dismissal, under the leaving the business due to ill-health policy (page 198).

100. On 16 March 2021 Mr Rupra confirmed that the claimant would be dismissed under that policy. The claimant completed a form indicating that he accepted the decision, adding the words, "I'm signing under duress because the business is saying they can't accommodate me due to my condition which comes under the Equality Act". He indicated he would not appeal against dismissal (page 416).

Coaching roles – issues 7.6 and 21.6

101. Finally, we address the point which arose during the hearing about coaching roles. This relates to issues 7.6 and 21.6. In the list of issues the claimant said that between July 2019 and October 2020 two sitting roles were given to staff. The respondent understood this to be a reference to roles in the resource/admin team. During his evidence the claimant clarified that he was actually referring to two coaching roles, not two resource roles.

102. We allowed this clarification of the list of issues and permitted the respondent's representative to ask supplemental questions of the respondent's witnesses about these roles. We did so because they had not said anything about the coaching roles in their statements, because they had not understood from the list of issues that those roles were relevant.

103. We find based on the evidence of Mr Shamraiz and Mr Miller that the coaching role would not have been suitable for the claimant. This is because the coaches were required to know and demonstrate all aspects of the various operational roles; they were physical roles which involved significant manual handling elements. They were not sitting roles. The claimant would not have been able to perform the coaching role.

The law

104. In this section we explain the legal principles which apply to the complaints the claimant is making.

Disability

105. Disability is a protected characteristic under sections 4 and 6 of the Equality Act 2010.

Direct disability discrimination

106. Section 13(1) of the Equality Act says:

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

Discrimination arising from disability

107. Section 15(1) of the Equality Act 2010 provides that 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."*

108. Section 15(2) says that:

"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."

109. In *Pnaiser v NHS England and anor* 2016 IRLR 170, EAT, Simler J summarised the approach to be taken under section 15:

"((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 section15 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…

(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… 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.

…

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

…

(h) … 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…

(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."

Failure to make reasonable adjustments

110. The duty to make reasonable adjustments comprises three requirements. In this case, the first requirement is relevant. This is set out in sub-section 20(3). In relation to an employer, A:

"(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."

111. Under section 21, a failure to comply with the duty to make reasonable adjustments amounts to unlawful discrimination.

112. Under paragraph 20 of schedule 8 of the Equality Act, an employer is not subject to the duty to make reasonable adjustments for someone in their employment if they do not know and could not reasonably be expected to know:

"that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first…requirement."

113. Paragraph 6.2 of the Equality and Human Rights Commission Code of Practice on Employment says:

'The duty to make reasonable adjustments is a cornerstone of the Act and requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers ... unfavourably and means taking additional steps to which non-disabled workers ... are not entitled.'

Harassment

114. Under section 26 of the Equality Act, 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."

115. Disability is a relevant protected characteristic for the purposes of section 26.

116. Conduct amounts to harassment if it has the required purpose or, in the alternative, the required effect. In a claim founded on the effect of conduct, a lack of intent by the alleged harasser is not a defence. However, in deciding whether conduct has the effect referred to, the tribunal must take 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."

117. There are therefore both objective and subjective elements to the test about effect, but overall the criterion is objective, the tribunal being required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for them to do so.

Burden of proof in complaints under the Equality Act 2010

118. Sections 136(2) and (3) provide for a shifting 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) This does not apply if A shows that A did not contravene the provision."

119. This means that if there are facts from which the tribunal could properly and fairly conclude that there has been unlawful discrimination, the burden of proof shifts to the respondent.

120. If the burden shifts to the respondent, the respondent must provide an "adequate" explanation, which proves on the balance of probabilities that the respondent did not fail to make reasonable adjustments.

121. The respondent would normally be expected to produce "cogent evidence" to discharge the burden of proof. If there is a prima facie case and the explanation for that treatment is unsatisfactory or inadequate, then it is mandatory for the tribunal to make a finding of discrimination.

Unfair dismissal

122. An employee who has worked for their employer for two years has the right not to be unfairly dismissed.

123. It is for the employer to show the reason for dismissal. Section 98(2) of the Employment Rights Act 1996 sets out reasons for dismissal which are potentially fair reasons. These include a reason which:

> "*relates to the capability … of the employee for performing work of the kind which he was employed by the employer to do."*

124. Under section 98(4) of the Employment Rights Act, where there is a potentially fair reason for dismissal:

> "*the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*
>
> *a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> b) *shall be determined in accordance with equity and the substantial merits of the case."*

125. The tribunal considers whether dismissal was within the range of reasonable responses open to the employer and must not substitute its own view of the appropriate penalty for that of the employer.

126. In a complaint of unfair dismissal which the employer says is for capability reasons, the tribunal will usually consider, in particular, whether:

126.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;

126.2 The respondent adequately consulted the claimant;

126.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

126.4 the respondent could reasonably be expected to wait longer before dismissing the claimant; and

126.5 dismissal was within the range of reasonable responses.

Conclusions

127. In this section we explain how we have applied these legal tests to our findings of facts about what happened in this case.

<u>Disability and knowledge of disability</u>

128. As explained in paragraph 2 of the list of issues, the respondent accepts that the claimant's physical condition of chronic pain amounted to a disability for the purposes of the Equality Act from July 2018.

129. The respondent accepts that it had knowledge of this disability from September 2019. We have considered whether, at any time before September 2019, the respondent knew or could reasonably have been expected to know that the claimant was disabled and if so at what point.

130. We have found that the Occupational Health report of 30 December 2017 did not suggest that the claimant's illness was a disability under the Equality Act. The report of 6 February 2018 said that the claimant was not disabled but added that, if the claimant 'got to' 12 months he was likely to be considered disabled. The report recorded that he had developed symptoms in July 2017.

131. By July 2018, the date at which the Occupational Health advisor had suggested the claimant may be disabled, the claimant had been back at work on light duties for some five months. He was still at work and, up until May 2019, had not triggered any absence thresholds. There was no reason for the respondent to seek additional information or make further enquiries about disability at this stage.

132. In May 2019 however, the claimant asked for breaks for health-related reasons and in June 2019 he had a week off with body pain. When he returned to work on 14 June he told Mr Shamraiz that his health issues were ongoing.

133. We have concluded that, after the claimant's absence for body pain in June 2019, the respondent could reasonably have been expected to make further enquiries about his health, particularly given the indication in the report of February 2018 that by July 2018 the claimant may be considered to have a disability. Further enquiries would have included another referral to occupational health.

134. If the respondent had made a referral in June 2019, they would have received a report about a month later, that is, by 14 July 2019 (we have found that the December 2017 report took a month). We have concluded that a report received in July 2019 would have been likely to have said the same as the anticipatory advice in February 2018 and the advice in the September 2019 report. In other words, a report in July 2019 would have said that the claimant was likely to be disabled. It would also have said, as the report did in September 2019, that the claimant was very limited in relation to walking and standing, that he would have to pace himself and that he required regular breaks.

135. Therefore, we have concluded that by 14 July 2019 the respondent could reasonably have been expected to know that the claimant was disabled. It could also reasonably have been expected to know that he was disadvantaged by the physical elements of his job and the length of the shifts.

136. The respondent also accepted that the claimant had a mental health condition which amounted to a disability from February 2021 and that it had knowledge of this disability from the same date. We heard very little evidence about the claimant's mental health condition; the claimant's complaints focused almost entirely on the impacts of his physical condition.

Direct discrimination and discrimination arising from disability

137. Next, we explain our conclusions on the complaints of direct discrimination (section 13 of the Equality Act, and paragraph 7 of the list of issues) and discrimination arising from disability (section 15 of the Equality Act, paragraph 19 of the list of issues).

138. We have to consider whether there was less favourable or unfavourable treatment by the respondent which was because of disability (the complaint under section 13 of the Equality Act) or because of something arising in consequence of disability (the complaint under section 15 of the Equality Act).

139. As a preliminary point, we conclude that the things relied on by the claimant as things arising in consequence of disability in paragraph 19 of the list of issues (the need for more frequent breaks, the need for seated work and the need to take sick leave) are things which arose in consequence of the claimant's physical disability.

140. The complaints of direct discrimination and discrimination arising from disability rely on the same six factual allegations.

141. The first five complaints, issues 7.1 to 7.5 (duplicated at 21.1 to 21.5) took place between November 2018 and 9 July 2019. We have concluded that the respondent could not reasonably have been expected to know that the claimant was disabled until 14 July 2019. Those complaints fail because the treatment complained of took place before that date. We have found that the respondent did not know and could not reasonably have been expected to know that the claimant was disabled at the time of the treatment complained of.

142. Even if the respondent knew or could reasonably have been expected to know at an earlier stage about the claimant's disability, none of the treatment at 7.1 to 7.5 (or 21.1 to 21.5) was because of disability (or because of something arising in consequence of disability):

    142.1 Issue 7.1: this issue is about the refusal of additional breaks. While Mr Miller did not grant additional breaks, he did allow split breaks. We have found that there was an agreement reached by Mr Miller with the claimant and his union representative that the claimant could take split breaks. Additional breaks were not refused because of the claimant's disability or something arising from it, but because split breaks were offered and accepted by the claimant and his union representative.

    142.2 Issue 7.4: the refusal of an additional rest break to recover from a headache. We have found that, again, a split break was permitted. The reason an additional break was refused was because of the earlier agreement regarding split breaks, and not because of the claimant's disability or something arising in consequence of it.

142.3 Issues 7.2 and 7.3 are about the volume of work, counting and monitoring work. We have not found these allegations to have been made out on the facts. We have not found that they happened. These complaints cannot succeed for that reason.

142.4 Issue 7.5 is about the allocation of a resource role in November 2018. There are no facts from which we could conclude that the claimant was not considered for or offered this this role because of disability or because of something arising in consequence of it. Therefore the burden of proof does not shift to the respondent on this issue. If it had done, we would have found that the reason that the role was allocated to the claimant's colleague was because of the formal process that the respondent went through to identify a role for her.

143. Issue 7.6 concerns the allocation of coaching roles. This is alleged to have taken place over a period of time, for part of which the respondent knew or could reasonably have been expected to know that the claimant was disabled. We have found that the coaching roles were not sitting roles and were not suitable for the claimant. Therefore the factual basis of this allegation is not made out.

144. For these reasons, the complaints of direct disability discrimination and discrimination arising from disability fail and are dismissed.

Reasonable adjustments

145. The complaint of failure to make reasonable adjustments is set out at paragraphs 11 to 18 of the list of issues (page 128 to 130).

146. We first consider whether there was a PCP that disadvantaged the claimant such that a duty arose for the respondent to take steps to avoid the disadvantage. PCP stands for provision, criterion or practice and it means a feature of the respondent's working arrangements.

147. Mr Chaudhry accepted on behalf of the respondent that the manual handling requirements of an OPG role as set out in paragraphs 11.1 to 11.4 amount to PCPs, in other words, manual handling was a required part of the role.

148. He also accepted that attending work on a daily basis, based on eight hour shifts with a 40 minute break was a requirement of the role. Those were the PCPs set out in paragraphs 11.5 and 11.6.

149. Mr Chaudhry did not accept that the feature described in paragraph 11.7 was applied by the respondent, in other words, he did not accept that the respondent allowed or required the claimant to continue working without an adequate or timely occupational health assessment. We have found that the respondent regularly referred the claimant to Occupational Health for advice. We have not concluded that the respondent had the PCP described in paragraph 11.7.

150. (In any event, none of the claimant's suggested adjustments related to the PCP in paragraph 11.7. Referring the claimant to occupational health would not, in itself, have avoided any disadvantage. This complaint would also fail for this reason.)

151. We have concluded that the respondent had the PCPs in paragraphs 11.1 to 11.6 of the list of issues. That means we have to consider whether the manual handling elements of the role and the working pattern in terms of days, hours and breaks, put the claimant at a substantial disadvantage. We have concluded that the claimant was substantially disadvantaged by the manual handling elements of the role, as these exacerbated his physical symptoms. We have also concluded that he was substantially disadvantaged by the working pattern because he had to pace himself and required regular breaks; one break was not sufficient for him to recover adequately.

152. We now consider whether the respondent failed to take steps that were reasonable to avoid those disadvantages.

153. No duty to make reasonable adjustments arose before July 2019. This is because, as we have already concluded, the respondent could not reasonably have known about the claimant's disability and the disadvantages at which this put him before July 2019. No duty arises before then, because of paragraph 20 of schedule 8 of the Equality Act. In any event, we note that the respondent had made some accommodation in terms of light duties from February 2018 and allowing split breaks from May 2019.

154. We have applied the legal principles to our findings of fact about the position after 14 July 2019, so that we can assess whether the respondent failed to take steps which would have been reasonable to have to take:

    154.1 The claimant was not at work after 9 July 2019 because he was unfit for work. His GP did not suggest any reasonable adjustments would assist to get him back to work.

    154.2 In September 2019 the Occupational Health advice was that the claimant was unlikely to be back at work for a further two to three months.

    154.3 In October 2019 he was still unfit for work.

    154.4 In December 2019 the advice was that he was unfit for work but hoping to return in the near future.

155. There were no facts which we have found upon which we could base a conclusion that offering any other role or offering to provide additional breaks to the claimant during the period July 2019 to June 2020 would have removed or reduced any disadvantage such that he could return to work. The duty only requires the employer to take steps which would have addressed the disadvantage and enabled the claimant to get back to work.

156. From June 2020 the medical position changed:

156.1 In June 2020 the claimant was still not fit for full normal duties but he told the occupational health advisor that he may be able to return in some capacity, for example, sit down roles.

156.2 By July 2020 the occupational health advisor recommended a referral to an Occupational Health physician to assess long term capabilities.

156.3 The occupational health physician's advice in August 2020 was that the claimant was unfit for his substantive role or any sitting role like sorting, and the claimant felt he could only do an office based role.

156.4 By September 2020 the advice was that the claimant would soon be fit to start a phased return having had injected medication.

157. We have found that from June 2020 the respondent started exploring and suggesting sit down roles or desk based roles but the claimant did not think any were suitable. At the time the GP fit note said that the claimant was not fit for work at all and, other than trying to identify suitable roles, we conclude that there were no other steps the respondent could reasonably have taken prior to the claimant being certified fit to start a phased return in October 2020.

158. When the claimant was able to return in October 2020 the respondent made adjustments. The claimant was in a sitting down role and had a phased return. He was working two and three hour days during the phased return but struggled with increasing hours and the phased return stalled. He was not able return to full time working. There was no failure to make adjustments in relation to the claimant's role during this time, or in relation to breaks when the claimant was working two to three hour shifts only.

159. We have concluded that the respondent did not fail to make any reasonable adjustments. In relation to the adjustments specifically suggested by the claimant, the respondent did not provide the claimant with a desk based job in the resource section as suggested (issue 16.1), but there was no vacancy available there at the relevant time. The respondent offered seated roles and made other reasonable adjustments including providing a seated role and reduced hours from October 2020, once the claimant was able to return to work. Those were reasonable steps to take to avoid the disadvantage to the claimant.

160. As to the adjustment suggested by the claimant in issue 16.2, about breaks, the respondent did not agree that the claimant could have additional breaks, but did agree (prior to the duty arising) that the claimant could take split breaks. That arrangement was agreed at a meeting where the claimant was present with his union representative. From 14 July 2019 when the duty to make adjustments began, additional breaks would not have assisted while the claimant was on sick leave and certified as unfit to return. From October 2020 when the claimant returned to work on a phased return, additional breaks were not required as the claimant was working short shifts of two or three hours.

161. In relation to the break suggested by the claimant as an adjustment for 9 July 2019 when he had a very strong headache (issue 16.3), we have concluded that the duty to make adjustments only arose after that date. If the respondent had been under a duty to make adjustments on 9 July, we would have concluded that offering the claimant the opportunity to split his lunch break was a reasonable adjustment in those circumstances.

162. For these reasons, the complaint of failure to make reasonable adjustments fails and is dismissed.

Harassment

163. The complaint of harassment has 19 factual allegations which are listed in paragraph 25 (page 131).

164. The legal test is whether the employer has subjected the claimant to unwanted conduct related to disability, and the conduct has the purpose or effect of violating the employee's dignity, or has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. We have referred to the last part of this test as having the purpose or effect of 'creating a hostile environment', for short.

165. The factual allegations in paragraphs 25.1, 25.2, 25.8, 25.9 and 25.10 relate to Mr Shamraiz counting work and monitoring: we have found that those did not happen as alleged. The same applies to paragraph 25.6, the allegation that Mr Shamraiz checked on the claimant in the washroom. We have also found that the allegation at paragraph 25.7 (refusing to refer the claimant to occupational health) did not happen. Those complaints of harassment fail because we have found that they did not happen.

166. In relation to the allegation at paragraph 25.3, we have found that Mr Shamraiz permitted the claimant a split break on 9 July, but not an additional break. There was no evidence before us that the claimant's headache on this day was related to his disability. But, in any event, that was not conduct which had the purpose or effect of violating the claimant's dignity or the purpose of creating a hostile environment for the claimant. It was in line with the agreement that had been reached on 24 May. Although the refusal to allow an additional break rather than a split break had the effect of creating a hostile environment for the claimant, we have decided it was not reasonable for it to do so in circumstances where the claimant was permitted to take a split break in line with an earlier agreement.

167. We reach the same conclusion in relation to paragraphs 25.4 and 25.5, the request to work on the tipping belt and the question about the jacket. We have not found that they were disability related. In addition, they did not have the purpose or effect of violating the claimant's dignity or the purpose of creating a hostile environment. They had the effect of creating a hostile environment for the claimant, but considering all the circumstances, it was not reasonable for them to do so.

168. Paragraph 25.11 (page 132) alleges that Mr Miller categorised the claimant as non-cooperative and stopping his pay. We have found that this happened as alleged. It was unwanted conduct which happened as a result of an administrative mistake by the respondent. We have decided that this error was not related to disability. It is an essential element of a complaint of this kind of harassment that the conduct be disability-related. The error happened in the context of the claimant's sickness review meeting, but it was not directed at the claimant because of his disability or related to disability.

169. We reach a similar conclusion in relation to paragraph 25.12 and 25.13 which are allegations about the meeting in the canteen. The respondent accepted that the meeting should not have happened where it did. Recommendations have been made to address the issues arising from this incident. Again, the conduct took place in the context of a disability-related sickness review meeting but was not related to the claimant's disability. The need to wait for a meeting room to become free was not related to disability. Holding a meeting in the canteen did not create a hostile environment for the claimant; he and his union representative agreed to it proceeding there. The question asked by Mr Miller about whether the claimant was working as an Uber driver was not related to disability. Mr Miller would have asked this of any employee had a similar concern been raised.

170. The allegation at paragraph 25.14 is about the bullying and harassment complaint the claimant made against Mr Shamraiz. This allegation is not made out on the facts. The claimant's complaint was not ignored; it was addressed by the respondent although not in the way the claimant wanted it to be. An employee relations advisor spoke to the claimant to take more information and decided not to hold a full investigation. She told the claimant to speak to Mr Iqbal about other issues. If the claimant had not been happy that a full investigation was not being carried out, he could have raised this with Mr Iqbal.

171. The allegations at paragraphs 25.15 and 25.16 are complaints against Mr Iqbal which we have found not to be proven on the facts. We have found that they did not happen. These allegations are based on misunderstandings.

172. Paragraph 25.17 is an allegation about delays dealing with the claimant's grievance against Mr Miller. We have found that there were delays, in particular in relation to the provision of the Stage 1 outcome. This was not sent to the claimant until 31 December 2019 after a meeting on 21 October 2019. That was outside the recommended timeline in the respondent's policy. However, the delay was not related to the claimant's disability such that it would amount to disability-related harassment.

173. The allegation in paragraph 25.18 is that the claimant was not given a single point of contact. We have not found that there was a policy at the time requiring that. There was always a point of contact available for the claimant during his sickness absence, although there were changes in his line manager from time to time, for example, when his manager left on promotion. The failure to appoint a single point of contact and the changes to the claimant's line manager were not related to the claimant's disability and did

not have the purpose or effect of violating the claimant's dignity or creating a hostile environment for him.

174. Issue 25.19 is an allegation that the respondent made a referral to occupational health for consideration of ill-health retirement without consultation with the claimant. We have not found this proven on the facts.

175. For those reasons the complaints of harassment do not succeed.

Unfair dismissal

176. The last complaint is unfair dismissal.

177. We have concluded that the respondent genuinely believed the claimant was no longer capable of performing his duties. There had been efforts to facilitate his return to work on limited duties which were unsuccessful, and the occupational health advice said that the claimant could not perform his substantive role.

178. The respondent adequately consulted the claimant and his trade union representative throughout, including in March 2021 before the decision to dismiss was made.

179. The respondent carried out a reasonable investigation, including finding out the up to date medical position. The respondent regularly obtained medical advice during the claimant's periods of absence, including from treating doctors, occupational health advisors and an occupational therapist.

180. Given the claimant's lengthy periods of absence and his request to be considered for ill-health retirement, it was not unreasonable for the respondent to decide not to wait longer before dismissing the claimant under its leaving the business on ill-health policy.

181. The respondent carried out searches for alternative roles in June and October 2020 and carried out a formal scoping exercise in January to February 2021. Only a narrow range of options could be considered, because of the criteria put forward by the respondent, and the respondent reasonably concluded, having made enquiries with all possible locations, that there was no suitable alternative role available for the claimant.

182. The respondent did not prematurely consider ill-health retirement; it declined to do so while investigating alternative roles, and only did so when other options had been exhausted. A formal occupational health report was obtained under the respondent's leaving the business on ill-health policy and the claimant was dismissed under that policy. He was offered a right of appeal which he did not take up.

183. Overall, the dismissal was within the range of reasonable responses of a reasonable employer in these circumstances. The complaint of unfair dismissal fails and is dismissed.

_____

Employment Judge Hawksworth

Date: 13 August 2024

Sent to the parties on: 28 August 2024

For the Tribunal Office

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/

Appendix – agreed list of issues on liability (pages 125 to 132 of the bundle)

Jurisdiction – Time Limits

1. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2 If not, was there conduct extending over a period?

1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

Disability

2. The Respondent accepts that the Claimant was disabled pursuant to section 6 of the Equality Act 2010:

2.1 In respect of chronic pain from July 2018; and

2.2 In respect of depression from February 2021.

3. The Respondent accepts it had knowledge of these disabilities:

3.1 In respect of chronic pain from September 2019; and

3.2 In respect of depression from February 2021 (having by then received 12 months of sick notes from the Claimant which cited depression).

4. In respect of the allegations that are prior to July 2018 (in respect of chronic pain) and February 2021 (in respect of depression):

4.1 Was the Claimant a disabled person at those relevant times within the meaning of section 6 of the Equality Act 2010?

4.2 Did the Respondent have knowledge (actual or constructive) of those disabilities at the relevant times (i.e. prior to September 2019 for chronic pain and prior to February 2021 for depression)?

Unfair Dismissal

5. What was the reason or principal reason for dismissal? The Respondent avers that the reason was capability (ill health) in accordance with section 98(2)(a) of the Employment Rights Act 1996.

6. If the reason was capability, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

6.1 The Respondent genuinely believed that the Claimant was no longer capable of performing their duties;

6.2 The Respondent adequately consulted the Claimant;

6.3 The Respondent carries out a reasonable investigation including finding out about the up-to-date medical position;

6.4 Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;

6.5 Dismissal was in the range of reasonable responses.

Direct Discrimination – Disability (section 6 and 13, Equality Act 2010)

7. Did the following acts occur:

7.1 On 24 May 2019, Darren Miller refused to grant the Claimant an additional break;

7.2 On 26 June 2019, Shamraiz Mohammed counted the volume of work done by the Claimant;

7.3 On 7 July 2019, Shamraiz Mohammed counted the volume of work done by the Claimant;

7.4 On 9 July 2019, Shamraiz Mohammed refused to allow the Claimant an additional rest break to recover from a very strong headache;

7.5 In November 2018, Fazia Wasim was placed in a resource role, which the Respondent failed to do for the Claimant; and

7.6 Between July 2019 to October 2020, there were 2 sitting job roles given to staff and the claimant was not informed by any communication channel although he was attending monthly meetings with the management. The claimant states he was fully able to do this job because he has done that kind of role before additional to his job role within the unit and management was aware of this.

8. Did that amount to less favourable treatment?

9. If so, was the Claimant treated in that way because of disability?

10. The Claimant relies on the following comparators:

For 7.1 (above): Dalip Kumar, Zoib Rana, Raja Hussain, Javed, akhtar,Kaiser, Micheal Praide, Mohamad Jirdi, Fiad Abdi, Rooprah, Patel , Mistry, sunitasethi

Amanpreet Kaur, Kirandeep Kaur, Raja Umar, GurjeetDyal, Alfred, Arora, Aman Gill, Felix Viegas ,Roy Augustin, Jamil Kyani, Jose Desilva, Addi, Manoj Kumar, James Miller, Iqbal, Baldev Maan, Kuga, Kusam Sharma, Jirayu , Razwan Ahmad, Laxmi Singh, Iqbal Mohammad, Davinder Bithel, Darren Miller, Laxman Kaul, Jai Rooprah , Nada, Suhana Begam, Abdul Ansari, Aman Mangat, Ramanpreet, Samira, AbiaKausar, Ahmad Ismail, Ajit Garg, David Townsend, Ahmad, Ahmed, Faisal, Fiazul Hassan, Anita Rani, Anita Vasudev, Anna Hylton, Ansar Malik, Asad Abdulle, Avtar Bhambra, Leonarda, Adrian Louise, Balwinder Kaur, Cloudio Alberto, Dalbir Sandhu, Shamraiz Mohammad, Amanda Bithel, Shabaz Khan, Minakshi, Raj, Sukhwinder Singh, Sumaira , Adbi Abdirehman , Ibby khan, Imran Aslam, Mona, Ozzy, Indra, Sukri.

For 7.2 (above): Ajit Garg , Ramanpreet (Preeti), Kuga, Harjit Kaur.

For 7.3 (above): Ajit Garg , Ramanpreet (Preeti), Kuga, Harjit Kaur.

For 7.4 (above): For 5.4 (above):Dalip Kumar, Zoib Rana, Raja Hussain, Javed, Akhtar Kaiser, Micheal Praide, Mohamad Jirdi, Fiad Abdi, Rooprah, Patel , Mistry, Sunita Sethi, Amanpreet Kaur, Kirandeep Kaur, Raja Umar, GurjeetDyal, Alfred, Arora, Aman Gill, Felix Viegas ,Roy Augustin, Jamil Kyani, Jose Desilva, Addi, Manoj Kumar, James Miller, Iqbal, BaldevMaan, Kuga, Kusam Sharma, Jirayu, Razwan Ahmad, Laxmi Singh, Iqbal Mohammad, Davinder Bithel, Darren Miller, Laxman Kaul, Jai Rooprah, Nada Suhana Begam, Abdul Ansari, Aman Mangat, Ramanpreet , Samira, Abia Kausar, Ahmad Ismail, Ajit Garg, David Townsend, Ahmad, Ahmed, Faisal, Fiazul Hassan, Anita Rani, Anita Vasudev, Anna Hylton, Ansar Malik, AsadAbdulle, Avtar Bhambra, Leonarda, Adrian Louise, Balwinder Kaur, Cloudio Alberto, Dalbir Sandhu, Shamraiz Mohammad, Amanda Bithel, Shabaz Khan, Minakshi, Raj, Sukhwinder Singh, Sumaira, Adbi Abdirehman, Ibby Khan, Imran Aslam, Mona, Ozzy, Indra, Sukri, Mohamad Abdi, Mohammad Ashgar, Sumiara Wasim, Daniel Sidhu, Abokar, Hussain, Mohammad Abdau, Jirde, Abdi, Ruksana Kausar.

For 5.5 (above): Faiza Wasim.

For 5.6 (above): Amanda Bothel, Michael Praide.

<u>Failure to make Reasonable Adjustments (section 20(3) and (4), Equality Act 2010</u>

11. Did the Respondent apply the following provisions, criterion or practices ('PCP'):

11.1 Manually sorting a large mass of letters and parcels of various sizes and weights into the York Roll Container;

11.2 Manually loading and unloading York Roll Containers, which involves twisting, kneeling and bending, and remaining in standing position;

11.3 Manually moving York Roll Containers by manually grasping and pulling them;

11.4 Manually clearing up the sorting area;

11.5 Attending work on a daily basis over a 5-day working week, based on a 8-hour shift, to carry out the above manually laborious functions;

11.6 To only have a 40-minute rest break (inclusive of lunch time) during the 8-hour shift; and

11.7 Allowing or requiring the Claimant to continue working without an adequate or timely occupational health assessment and recommendations.

12. If so, did the operation of the PCP put the Claimant at a substantial disadvantage in relation to persons who are not disabled?

13. The Claimant relies on the following substantial disadvantages

13.1 His mental and physical health deteriorated and his symptoms were exacerbated; this relates to the PCP's at 11.1, 11.2, 11.3, 11.4, 11.5, 11.6. 11.7

13.2 He was unable to rest and recover adequately during rest breaks in working shifts; this relates to PCP's 11.5, 11.6.

13.3 Management did not act upon occupational health advice; this relates to PCP 11.7.

13.4 The Respondent questioned and scrutinised him as to his health rather than following occupational health guidance, thus subjecting him to increased stress; this relates to PCP 11.7

13.5 The Claimant was unable to return to work in a timely manner or at all; and

13.6 The Claimant was considered for occupational health for ill health retirement rather than considering the recommended adjustments by occupational health to facilitate a return to work; paragraphs 13.5 and 13.6 relate to all PCP's 11.1-11.7.

14. If so, did the Respondent know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage?

15. If so, did the respondent take such steps as were reasonable to alleviate that disadvantage?

16. The Claimant avers that the Respondent should have taken the following steps:

16.1 Providing the Claimant with a desk-based job in the resource section rather than requiring him to continue In his OPG Postman role;

16.2 Granting the Claimant an additional break to allow reasonable rest and recovery time; and

16.3 Granting the Claimant a rest break of sufficient duration to recover from this very strong headache.

17. Was it reasonable for the Respondent to have taken those steps, if so, when?

18. Did the Respondent fail to take those steps?

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

19. Did the following things arise in consequence of the Claimant's disability:-

19.1 The need for additional breaks due to chronic pain and depression;

19.2 The need for seated or sedentary work due to chronic pain and depression;

19.3 The need to take sick leave due to chronic pain and subsequently depression.

20. If so, was the Claimant treated unfavourably because of any of those things?

21. The Claimant relies on the following unfavourable treatment:

21.1 Darren Miller refusing him an additional break on 24 May 2019;

21.2 Shamraiz Mohammed counting the volume of the Claimant's work on 26 June 2019;

21.3 Shamraiz Mohammed counting the volume of the Claimant's work on 7 July 2019;

21.4 Shamraiz Mohammed refusing to allow the Claimant an additional break to recover from a very strong headache on 9 July 2019;

21.5 Placing Fazia Wasim into a resource job but not the Claimant in November 2018.

21.6 Giving sitting positions to 2 of the staff whilst the Claimant was off sick without informing him about the positions and completely ignoring him between July 2019 and October 2020.

22. If the Claimant was treated unfavourably because of something arising in consequence of his disability, can the Respondent show that any such treatment was a proportionate means of achieving a legitimate aim?

23. The legitimate aims relied upon by the Respondent are:

23.1 The Respondent's need to work efficiently and productively and in line with the resources available; and

23.2 Allocating vacant roles according to the principles agreed with the recognised trade unions.

24. Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? If so, from what date?

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

25. Did the Respondent do the following things:

25.1 Shamraiz Mohammed counting the volume of the Claimant's work on 26 June 2019;

25.2 Shamraiz Mohammed counting the volume of the Claimant's work on 7 July 2019;

25.3 Shamraiz Mohammed refusing to allow the Claimant a break to recover from a very strong headache on 9 July 2019;

25.4 Shamraiz Mohammed telling the Claimant to go and "cut and tip" in front of all of the staff on 2 April 2019;

25.5 Shamraiz Mohammed making comments about the Claimant's jacket and asking why he felt cold in the month of May and then smirking on 2 April 2019;

25.6 Shamraiz Mohammed checking on the Claimant in the washroom and making comments to him that he had been away from work for a long time and that he was monitoring how much time the Claimant was spending and where on 23 May 2019;

25.7 Shamraiz Mohammed refusing to refer the Claimant for an Occupational Health assessment on 4 June 2019;

25.8 Shamraiz Mohammed counting the Claimant's work and saying "only this much work that you have done until now" in front of other staff members on 26 June 2019;

25.9 Shamraiz Mohammed deliberately monitoring and micro checking on the Claimant on 26 June 2019;

25.10 Shamraiz Mohammed counting the amount of the Claimant's work on 7 July 2019;

25.11 Categorising the Claimant as non co-operation and stopping his pay between 3 August 2019 and 23 August 2019;

25.12 Keeping the Claimant and his representative waiting for about 40 mins formal sickness review meeting and conducting it in the canteen rather than in the pre-booked meeting room on 3 September 2019;

25.13 Making adverse comments during the formal sickness review meeting on 3 September 2019;

25.14 Ignoring the Claimant's formal complaint of bullying and harassment and not properly addressing it, as well as making comments about how the complaint would be handled on 11 September 2019;

25.15 Mohammed Iqbal questioning whether the Claimant actually has the medical conditions described in the Occupational Health report during a sickness review meeting on 15 October 2019;

25.16 Mohammed Iqbal telling the Claimant that there was no plan to enable him to return to work and that he was only interested in knowing about the Claimant's condition on 12 February 2020;

25.17 Unduly delaying, acknowledging or acting on the Claimant's grievance regarding the stoppage of sick pay on 3 September 2019;

25.18 Not providing the Claimant with a single point of contact during his sick leave from 9 July 2019 to early 2020; and

25.19 Referring the Claimant to Occupational Health to consider ill health retirement without consultation or agreement with the Claimant.

26. If so, did that amount to unwanted conduct?

27. If so, did it relate to disability?

28. If so, did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

29. If not, did it have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

30. If so, was it reasonable for the conduct to have such an effect taking into account the Claimant's perception and the other circumstances of the case?