



EMPLOYMENT TRIBUNALS

Claimant: Mr. Kemar Knight
Respondent: London United Busways Ltd

Heard at: Watford by CVP
On: 9,10,11 September 2024
11 October 2024
11 November 2024 (in chambers)
12 November 2024

Before: Employment Judge S. Matthews
Ms. H. Edwards
Mr. D. Sagar

Representation

Claimant: In Person
Respondent: Mr. Nuttman (Solicitor)

JUDGMENT having been sent to the parties on 19 December 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant, Mr Knight, a bus driver, brings complaints of failure to make reasonable adjustments and harassment related to disability. He has been employed by the respondent since 20 October 2018 and continues to work for the respondent. He contacted Acas on 24 October 2022 and a certificate was issued by Acas on 5 December 2022. The ET1 was received by the tribunal on 4 January 2023.
2. The claimant alleges that the respondent failed to take steps that he says were reasonable to provide a more spacious office with windows providing natural light and air and a suitable chair. He says he needed the adjustments because of his disabilities which he lists as sciatica, claustrophobia, hypertension, depression and anxiety. He further alleges harassment related to his disability by Mr Tom Wilson, at the time the respondent's Head of Health and Safety, in that he says Tom Wilson spoke to him in an unprofessional manner on 22 April 2022.
3. The tribunal had a bundle of 352 pages. Numbers in brackets below refer to page numbers in the bundle.

4. The tribunal heard evidence on behalf of the claimant from:

- The claimant himself;
- Hanafi Abdulhakim Sofiani, a Union Representative who accompanied the claimant to his grievance appeal; and
- Roachelle Campbell, the Union Branch Secretary

The tribunal heard evidence on behalf of the respondent, from:

- Jim Small, the respondent's Head of Operations; and
- Tom Wilson, who no longer works for the respondent but who at the relevant time was the Head of Health and Safety and Strategic Risk.

Paragraphs in their witness statements are referred to below by their initials and paragraph numbers (XY/1)

5. On 1 day the tribunal heard the respondent's submissions that the claim should be struck out. They related to a dispute regarding disclosure, the claimant having disclosed very heavily redacted GP notes. The application to strike out was refused and oral reasons were given.

6. There was further disclosure by the claimant on day 2 :Health and Safety Policy Arrangement 1: Risk assessment March 2018 and Bus Driver Medical Standards 2017.

The issues

7. The issues to be decided by the tribunal were:

1. Jurisdiction

Have the Claimant's claims been brought in time? The Claimant contacted Acas on 24 October 2022 and as such, the Respondent contends that any claim based on any act or omission which occurred prior to 25 July 2022 is out of time.

1.1. The Claimant contends that, at all material times, he had the following

conditions:

1.1.1. Sciatica;

1.1.2. Claustrophobia;

1.1.3. Hypertension;

1.1.4. Depression; and

1.1.5. Anxiety.

1.2. Is the Claimant disabled within the meaning of Section 6 Equality Act 2010?

Namely:

1.2.1. Does the Claimant have a physical or mental impairment?

1.2.2. If so, does the impairment have an adverse effect on the Claimant's ability to carry out normal day-to-day activities?

1.2.3. If so, is that effect substantial?

1.2.4. If so, is that effect long-term?

1.3. If the Claimant is deemed to be disabled, did the Respondent know, or should it have known, that the Claimant was disabled by reason of Sciatica, Claustrophobia, Hypertension, Depression and/or Anxiety?

2. Failure to Make Reasonable Adjustments

2.1. Was the Respondent under a duty to make reasonable adjustments for the Claimant?

2.2. What provision, criterion or practice or physical feature ("PCP") does the Claimant claim put him at a substantial disadvantage? The Claimant refers to the following:

2.2.1. the room made available to Unite the Union which the Claimant used to carry out his Trade Union duties; and

2.2.2. the chair made available for the Claimant to use in the room made available to Unite the Union.

2.3. Was the PCP applied to the Claimant?

2.4. Did the PCP put the Claimant at a substantial disadvantage compared to those who did not have his disability?

2.5. Did the PCP's put the Claimant, in particular, at a disadvantage?

2.6. Did the Respondent take such steps as were reasonable to avoid the disadvantage?

In particular, the Claimant alleges that the following were reasonable adjustments:

2.6.1. the provision of a more spacious and private office with windows providing natural light and air; and

2.6.2. a suitable chair.

3. Harassment on Grounds of Disability

3.1. In accordance with Paragraph 1, has the claim been brought in time?

3.2. Did the Respondent engage in unwanted conduct? The alleged unwanted

Conduct relied upon by the Claimant is as follows:

3.2.1. On or around 22 April 2022, during a meeting with Tom Wilson, the Respondent's Former Head of Health, Safety and Strategic Risk, Mr Wilson allegedly spoke to the Claimant in an unprofessional manner.

3.3. If the Tribunal finds that the Respondent engaged in unwanted conduct, did the unwanted conduct relate to the Claimant's disability?

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

3.5. Was such an effect reasonable?

4. Remedy

4.1. If all or any of the Claimant's claims succeed to what remedy is he entitled?

Factual findings

8. Not all matters that the parties told the tribunal about are recorded in these findings of fact. We have limited our findings of fact to points which are relevant to the legal issues. Not all matters which the claimant may have felt were unfair, or he wanted to tell us about, were relevant to the factual findings that we needed to make in order to decide the issues which were set out in the case management order.

The Office

9. Our first finding related to the claimant's role and the equipment provided to him. The claimant substantive role was bus driver. He was elected as a union representative from 1 April 2022 and that was when the dispute arose. It was about the office allocated to him for his union duties. The office was allocated for union use. Friday was the claimant's 'stand down' day, ie, he was stood down on that day to do union duties. The respondent did not control his work on Fridays, he was doing work for the union. A laptop was provided by the union for his union duties; a desk, chair and office were provided by the respondent. This was not pursuant to a formal written agreement; it was just a practice that had developed and was in place.
10. The attendance record for the relevant period shows that the claimant carried out his substantive role of bus driver relatively infrequently during the relevant period, April 2022 to January 2023, because he was doing a great deal of work in his capacity as union officer (232). On days other than Fridays he would attend meetings in his role as union representative, for example, disciplinary meetings and sickness management meetings. We heard evidence from Jim Small that he would not need a computer or desk for those duties. The task of summing up at the end of a meeting was often done verbally and the claimant could be required to move around to attend several

meetings in one day in different locations.

11. The claimant asked to move from the original office allocated to the union when he took over as union rep. The original office was on the second floor. He asked to move to an office on the first floor. John Boyce, the Operations Manager, allocated an office to the claimant on the first floor which the claimant considered a very small office. It had been used previously by the CCTV Operator, and it had no windows. The claimant told John Boyce that it was not suitable because he suffers from claustrophobia. He wanted the office which was next door, a larger office. That was an office used occasionally by Mr Southgate, the Garage Manager, when he visited the depot. The claimant was told he could not have that one as it was now going to be allocated to a traffic manager.
12. The claimant raised a grievance about the office on 8 April 2022. He said the room allocated was too small and it would trigger his claustrophobia (143 to 144).
13. In between raising the grievance and the grievance hearing, John Boyce arranged for a risk assessment to be carried out by Tom Wilson. I am going to refer to that separately below as that relates to the claimant's allegations of harassment.
14. The grievance hearing took place on 3 May 2022 chaired by Kevin Waite, Operations Manager, and the claimant was accompanied by Richard Cushen, his union representative.
15. After the grievance hearing but before reaching a decision, the respondent looked into the cost of converting a portacabin to an office as suggested by the claimant, but it was £7,000 to £8,000 which they deemed too expensive (JS/25).
16. The grievance was not upheld, and the claimant was informed of the outcome on 30 June 2022 (documents 157 to 160). The outcome referred to reasonable adjustments that could be made which was leaving the door open and booking time in the boardroom when it was free.
17. The claimant appealed on 22 July 2022 (161 to 164). In that letter of appeal the claimant raised a new matter which was that he was upset about the fact that a risk assessment had been carried out by Mr Wilson. He felt that it was organised as a form of bullying, harassing and discriminatory tactics and that it was not a genuine risk assessment. He said, "I felt very discriminated against and uncomfortable due to my disabilities".
18. There was a delay in holding the appeal due to a lack of resource but also the claimant's failure to reply regarding convenient dates (JS/29 to 30). When it did take place the claimant was accompanied to the appeal by Hanafi Abdulhakim Sofiani, who gave evidence on behalf of the claimant. He described the frustration of the claimant with the process and the delay.
19. Jim Small issued the outcome of the appeal on 3 February 2023 (198 to 199). He decided not to uphold the grievance, but he adopted a pragmatic approach and gave the claimant what he wanted in that he decided to move the traffic manager upstairs to free up the room that the claimant had

requested back in April. That decision was, in part, because the boardroom, which the claimant had been told he could use, was about to become a staff area so that would no longer be open to him.

20. We find the respondent had made their position clear on the reasonable adjustment of a different room by the outcome of the grievance on 30 June 2022. At that stage it was clear that the claimant was not going to be given a larger office. That is relevant to the time limit for bringing a claim which we will refer to later in this judgment.

Meeting with Tom Wilson

21. John Boyce arranged for a risk assessment to be carried out by Tom Wilson (TW/14). At that time Mr. Wilson was the head of Health and Safety. There is no record of the meeting being arranged. It was arranged by telephone or by email. Unfortunately, the claimant was not told about it, and he was surprised when Tom Wilson turned up to talk to him on 22 April 2022. Tom Wilson said himself it would have been better if the claimant had been told in advance, it would have smoothed the way, and that was also acknowledged by Jim Small in his appeal outcome letter (198 to 199).
22. In the claim form the claimant says, "After our discussion I was left feeling bullied harassed and discriminated against by him". In the list of issues it is recorded that the claimant considered that Tom Wilson spoke to him in an unprofessional manner.
23. The claimant suspected that the real purpose of the meeting was not to carry out a risk assessment. Tom Wilson explained that his practice was to start preparing to write a risk assessment before the meeting, continue during the meeting, which may involve a discussion, and then finalise the risk assessment after the meeting. We find that a risk assessment was carried out. It is attached to the grievance outcome. The claimant did not raise his concerns about the purpose of the meeting until the grievance meeting where he said that he did not think this was really an informal meeting as notes were taken. He appears to be alleging that there was an ulterior motive but that was not fully explained. We find notes were taken to assist Tom Wilson prepare the risk assessment.
24. The outcome of the grievance stated that the 'nature' of the meeting was a a risk assessment for the bus driving role as well as the union role.
25. We think this is mistaken because Tom Wilson's evidence was that he was not assessing for the bus driving role. He asked the claimant about driving so he could see the extent of his claustrophobia and sciatica, and we accept his evidence on that. We find it likely he would need to see him in the bus in order to risk assess him for that. But even if he had decided to do a risk assessment for bus driving, we find that would have been entirely reasonable in the circumstances.
26. A copy of the risk assessment was attached to the grievance outcome (157 to 160). In his appeal against the grievance outcome dated 21 July 2022, the claimant expanded on his feelings about the risk assessment stating that: "It was organised form of bullying harassing and discriminatory tactics are (sic) definitely not a risk assessment." In short, he felt his job was under attack.

27. In his witness statement he describes the meeting with Tom Wilson. He said that Tom Wilson was welcoming at first and shared that his father was a union rep. They chatted casually and Tom Wilson emphasised it was an informal conversation. But then the claimant felt Tom Wilson's tone shifted as he started talking about the claimant's driving and asking how his conditions affected it, then 'his tone became threatening', 'his demeanour became more aggressive; and 'according to him, my position might be untenable' (KK/ 4).
28. Roachelle Campbell, Union Secretary, overheard some of the conversation when Mr Wilson and the claimant came out of the office to continue their discussion. She said that she heard Tom Wilson refer to a risk assessment that could affect both the claimant's jobs. She said Tom Wilson was abrupt and dismissive and hostile about the suggestion of a different office and the claimant was upset because he did not think a complaint about the office should lead to a risk to his other job. Her statement was prepared sometime after the event on 8 August 2024, and she cannot remember the precise words that were said. We find that the claimant was also not clear on the precise words that Tom Wilson used. The words that he did remember appear innocuous, and the tribunal found it was more a feeling that the claimant was left with rather than what was said. He was unsettled by the fact that a risk assessment was being done rather than the actual words said by Tom Wilson. He said he was upset by the 'tone', but it is very difficult for the tribunal to draw conclusions about the tone from the description given either by the claimant or Roachelle Campbell. They gave no evidence about body language for example. Overall, the tribunal were not satisfied that Tom Wilson spoke to the claimant in an unprofessional manner and were not satisfied that it created an environment that had the effect of violating the claimant's dignity.
29. Even if the claimant did feel offence at a risk assessment being undertaken, we find that it was reasonable for the respondent to do a risk assessment. The purpose of a risk assessment is to assess the risk to an employee; it is for the employee's benefit to ensure that they are kept safe. It is not a means of removing them from a role although, of course, that could be an outcome if it is unsafe for them to do the role and that would be for their own benefit. It was relevant to the outcome of the grievance to do a risk assessment to see whether it was safe or not for the claimant to continue to work in that office. It made sense to do it before the grievance meeting. As indicated in paragraph 25 above the tribunal considers it would have been perfectly reasonable to do a risk assessment for driving at that time as well to make sure that the claimant was safe.

Disability

30. The task of the tribunal is to decide whether the claimant had a disability at the relevant date of discrimination. The relevant period is potentially April 2022 to, at the latest, the hearing of the appeal on 19 January 2023. To explain that the claimant was elected union rep on 1 April 2022; he raised his grievance on 8 April 2022; his visit by Tom Wilson was on 22 April 2022; the outcome of the grievance was 30 June 2022; and the outcome of the appeal was 19 January 2023.
31. A shorter relevant period applies for the reasonable adjustment of the office.

The relevant period ended with the outcome of the grievance hearing on 30 June 2022. In respect of the harassment claim, the date of the meeting was 22 April 2022. That is when the claimant says the discrimination occurred. The tribunal's conclusion therefore is that the relevant period ended on 30 June 2022 (see paragraph 20 above), but our conclusions would be the same even if it ended at the outcome of the appeal.

32. There was limited evidence in the claimant's statement about the impact of his alleged disability. The burden of proof is on the claimant to establish that he had a disability which falls within the definition of the Equality Act 2010. The claimant had plenty of direction in the proceedings leading up to the final hearing about the evidence that he needed to produce to establish disability. He had a duty to disclose documents if relevant and necessary for fairly disposing of the proceedings.
33. In particular very limited evidence was provided of the day to day impact of his alleged disabilities, and it was barely referred to in his witness statement even though the witness statement was headed "Impact statement". There were relevant documents in the bundle on which the claimant was cross examined; there were extracts from his GP records from May 2021 to September 2023 (252 to 277 and 295 to 299), albeit these were heavily redacted.
34. There is a letter from his GP dated 15 September 2023 (307 to 308). This is the letter which the claimant asked the GP to write. The tribunal has only been able to place limited weight on this as it is not based on an examination but a review of the notes and what the doctor was told by the claimant.
35. There are also Occupational Health reviews. These were telephone assessments, 16 September 2020 (241 to 242); 10 February 2021 (248) and; 15 May 2021 (278).
36. We will look at each of the disabilities in turn.

Sciatica

37. NHS Guidance (310 to 313) states that:

"Sciatica is where the sciatic nerve, which runs from your lower back to your feet is irritated or compressed ... it usually lasts six weeks but can last longer."

38. The Guidance advises carrying on with normal activities and not sitting too much. There are many entries in the documents which mention sciatica or low back pain or leg pain between 2019 and 2023:

2019

39. In May 2019 the claimant suffered the sudden onset of low back pain (245). GP notes dated 1 September 2019 record 'low back pain (first)' (226). They record intervertebral disc prolapse from 20 August 2019 and lumbar spinal stenosis (bundle 299). On 7 November 2019 there is a fit note for a phased return to work.

2020

40. An Occupational Health report dated 18 September 2020 records that the claimant reported a history of sciatica with the onset of symptoms last year (241 to 242). It is recorded that the claimant takes paracetamol and codeine based medicine when he is not driving and the Occupational Health consultant recommends discussing part-time duties (eight hours, three days a week) and predicts a timescale for recovery of three months. Sciatica is first recorded in the GP notes on 3 November 2020 (223).

2021

41. The claimant spoke to an Occupational Health consultant on the telephone on 10 February 2021. She recorded that part-time working had been recommended in the previous report but in fact, the claimant had been absent from work since October 2020, returning at the beginning of February 2021 on the recommendation of his doctor to work five days on, two days off. She stated that the claimant was expected to improve, was awaiting physio, the condition was not affecting his ability to carry out day to day activities and he was able to drive (246 to 248).
42. In her opinion, at that time the claimant was not disabled under the Equality Act. We agree with that on the basis of the description in the report the expected improvement.
43. There was a further Occupational Health Assessment on 12 May 2021 (278 to 281). It stated that the claimant was fit to carry out his duties of driving for a maximum eight hour shift, five days in a row. It reported that he sometimes walked with crutches because otherwise his leg would give way. Physiotherapy had been recommended, and his employer was to carry out an assessment to identify additional equipment such as back and seat cushions.
44. The Occupational Health consultant records an improvement is still expected but it is difficult to give a prognosis. It records that in addition to mobility problems he has difficulty bending and putting his shoes and socks on. In her opinion at that time, she considers him disabled under the Equality Act, there having been no improvement in his condition.
45. From these records and the Occupational Health reports, we are satisfied that sciatica started in 2019 or 2020. In September 2020 the claimant was seen by an Occupational Health consultant, and he was expected to get better.
46. In February 2021 the problems were still ongoing, but he was able to return to work and could manage everyday activities. In May 2021 the problems were still ongoing and his mobility was more affected. He sometimes used a crutch and he was struggling with getting dressed. His ability to carry out day to day activities was adversely affected by May 2021.
47. Around October 2021 a back cushion was purchased for driving the bus as recommended by the Occupational Health consultant (286). He returned to work from 13 September 2021, but he is recorded as absent for sciatica from 2 August 2021 (287 to 290). There are fit notes at the end of 2021 for lumbago with sciatica (282 to 283) and the GP reports that when he was seen on 22 December 2021 he was walking with a stick.

2022

48. At the beginning of 2022 the claimant was listed for day surgery on 1 March 2022. He had a general anesthetic for a sacroiliac injection (292).
49. The GP notes on 9 March 2022 (recording lumbar spinal stenosis) refer to improvement in left leg pain since the injection (260). It is reasonable to assume that it would not have improved if it were not for that injection.
50. On 15 June 2022 it is recorded that the pain in his lower back persists, and he is listed for surgery (256).
51. The claimant asked to be near the lift when he moved office in April 2022. He discussed his condition with Tom Wilson on 22 April 2022 and sciatica is mentioned in the risk assessment (145 to 146). He told Tom Wilson he was using his back support at that time (TW/18.6) (35).
52. The claimant made a successful application for a blue badge on 22 October 2022 (294).

Conclusion on Sciatica

53. Having found that symptoms were adversely affecting his day to day activities from May 2021, we are satisfied that was ongoing through to April/May 2022 and beyond. So, as at the relevant date in April 2022, it had lasted at least 11 months, and we are satisfied that it was likely to last 12 months, even were it not for the benefit of hindsight at that time we have reached this conclusion after careful analysis of the evidence before us. We have not made inferences to filling gaps where there are redactions. We did find the GP notes confusing because of the redactions but we are satisfied overall that the claimant had this impairment which affected his day to day life at the relevant time. The Occupational Health Reports give helpful updates as the condition progresses.
54. The respondent's representative suggested that the redactions in the GP notes were a deliberate attempt by the claimant to hide that there are different causes for the claimant's sciatica. That was set out in the closing submissions which we considered. We do not accept this argument. The Occupational Health reports do not suggest a fluctuating condition but a worsening one and although the NHS Guidance states that sciatica usually lasts six weeks it acknowledges that it can last longer. Moreover, references to low back pain, lumbar spine stenosis and disc prolapse cannot be taken to be inconsistent with the label the claimant has applied of sciatica. Sciatica describes the symptoms. It is not for the tribunal to decide on the cause of the condition, it does not have the medical expertise to do so. The tribunal's task is to look at the impairment itself and its effect on the claimant's ability to carry out day to day activities. In this case, the tribunal is persuaded that the claimant had a mobility impairment owing to back and leg problems which, as of April 2022, had lasted at least 11 months and could reasonably be expected to last 12 months. Accordingly, we find that it amounted to a disability within the definition of the Equality Act 2010 at the relevant time. We are satisfied that the respondent was aware of the impairment from the fit notes and the Occupational Health reports that we have referred to above.

Claustrophobia

55. The only entries in the GP notes related to claustrophobia are in April 2022. On 1 April 2022 the claimant told his GP that he gets breathless and has palpitations when in a small, confined space. He is recorded as saying that it has been ongoing for the last year (258). On 4 April 2022 he said he gets low and anxious and gets claustrophobia in confined spaces (257 to 258).
56. On 24 May 2023 he asked the GP to write a letter and she recorded what he said which is that he had suffered from claustrophobia since childhood and needed counselling and that helped (307).
57. Claustrophobia is not referred to on the health questionnaire that the claimant completed at the beginning of his employment (228) or in the Occupational Health reports. The claimant first told the respondent about the condition when he was shown the office. He told Tom Wilson about it, saying when in a closed space 'my chest tightens, I start to hyperventilate and sometimes I even have panic attacks.'
58. There is no formal diagnosis by the GP. The GP records are based on his report that he has had the condition firstly, for the last year and then since childhood. While a medical diagnosis is not essential in deciding whether there is a disability under the Equality Act, the effect on his day to day life is and we would expect some reference in the GP notes before April 2022 if it had been significantly affecting his day to day life. We also note the claimant was able to use the lift as his office was on the first floor. When he spoke to Tom Wilson he said that his driving was more impacted by sciatica than claustrophobia.
59. We conclude that the claimant has not demonstrated a substantial effect on his ability to carry out normal day to day activities as a result of the condition alleged, claustrophobia, and therefore it does not amount to a disability within the definition of the Equality Act 2010.

Depression and anxiety

60. The GP notes indicate that the claimant was prescribed sertraline in November 2021 which was presumably as an antidepressant (265). It is not evidenced how long he took it for but on 24 January 2023, a few days after the appeal hearing, GP notes recorded 'depression interim review' (253) which records that he would like to restart sertraline.
61. Depression was discussed briefly at the respondent's sickness review in January 2022. The claimant reported he was having talking therapy instead of antidepressants, but the sickness review was mainly about his sciatica (290).
62. Just before the relevant period starting in April 2022, the GP notes describe depression as active and refer to an interim review on 17 March 2022 (252). That entry is redacted so we make no findings on the effect of depression. Apart from a reference to feeling low in conjunction with claustrophobia which we refer to above, there is no reference to the condition in 2022 in the GP records.

63. The letter from the GP, dated 15 September 2023, refers to depression and anxiety as well as claustrophobia, but it does not record how long this has been in place.
64. We accept that the claimant has the condition or had the condition of depression because, shortly before the relevant period, the GP notes record it as active. But it is not clear that it had lasted for 12 months or could be expected to. It could be a fluctuating condition. Redacted notes make it difficult to assess. It appears that the claimant was not on sertraline at the relevant period. He managed to work throughout 2022 notwithstanding he was not on medication. There is nothing in his witness statement or the documents to indicate it was having a substantial effect on his normal day to day activities at the relevant time.
65. Accordingly, we do not accept that it amounted to a disability within the definition of the Equality Act. Moreover, the relevance to his claim for reasonable adjustments or harassment is not explained.

Hypertension

66. The condition of hypertension is not referred to in the Occupational Health reports. The claimant stated in cross examination that he had been on medication from April 2022 to June 2022. It is referred to as a condition in the GP notes in October 2021 (252 and 267).
67. The GP's letter 15 September 2023 (307) states that "He has hypertension that is currently uncontrolled which has resulted in headaches." While the tribunal accepts that the claimant has the diagnosed condition the impairment was not serious enough to stop him driving or to report to the DVLA. When not on medication the only symptom was headaches. No other symptoms are recorded. We therefore find no evidence to indicate a substantial effect on normal day to day activities and we do not accept that it amounted to a disability within the definition of the Equality Act 2010. In addition, the respondent was not aware of it and could not be expected to be aware of it. The claimant did not refer to it until he brought proceedings. It is not in the risk assessment, grievance, grievance appeal or fit notes or any Occupational Health report. Further, the relevance to the claim for reasonable adjustments and harassment is not explained.

Reasonable Adjustments

68. In the claim form the claimant says that since April 2022 he has requested a 'supporting sciatica chair to use in the office'. The grievance brought in April 2022, which we outline above, did not refer to that. The claimant wrote to Mr Southgate, the General Manager, on 1 April 2022 about the size of the office. He did not mention the chair in that email (140). He said he mentioned it verbally to Mr Southgate in May 2022. And on 26 September 2022 he referred to asking Mr Southgate about the chair and complained it was "over 3 months now since I made the request" (173).
69. As discussed above, in the Occupational Health report dated 12 May 2021 it was recommended that the respondent carry out an assessment to identify helpful additional equipment such as back and seat cushions. The claimant was subsequently provided with a back support.

70. Tom Wilson considered the risk of further aggravation of back pain when he carried out the risk assessment in April 2022 (159) (TW/18.3 to 18.6). In evidence he explained that the particular chair was being used at the time by someone else, but he observed the claimant sitting in a similar chair and he observed that he looked comfortable. He spoke to him about the back support he had on the bus and the claimant said he used that in the office. He also took into account that, unlike in a bus, the claimant could get up and walk around which is, of course, beneficial for sciatica.
71. The claimant did not refer to the need for a chair when he appealed the grievance (161 to 164). He raised it verbally at the appeal meeting on 24 January 2023 (180 to 182). That was of course some time later after the issue of proceedings.
72. Posturite, who carried out an assessment on 26 January 2023, shortly after the appeal hearing and after the claimant had brought these proceedings, decided that the chair that he had was not suitable (189). They recommended an alternative chair with a seat span suitable for his thigh length and adjustable back rest suitable for his back length (183 to 200). Such a chair has now been provided (JS/54). However, the tribunal note that the claimant told Posturite that 95 to 100% of his working day was computer based (185) which the tribunal found was not the case. Also he does not appear to have told them about his back support that had already been supplied by the respondent for his driving.
73. We accordingly find that the lack of what the claimant terms a "sciatica chair" did not put the claimant at a substantial disadvantage. Posturite was not in possession of the full information. The claimant had the back support; a risk assessment was done by Tom Wilson; he did not raise issues that the chair supplied was affecting his symptoms when he had plenty of opportunities to do so; he did not raise that issue with Tom Wilson and Tom Wilson was satisfied, on observation, that it was not causing him difficulties.

Time limit

74. If we had found it was a reasonable adjustment, we would find that time would start to run from 22 April 2022, that is when the claimant was risk assessed by Tom Wilson.
75. We did not hear any persuasive evidence from the claimant about why he waited until 24 October 2022 to go to Acas. While we accept that he is a litigant in person he is also a union representative who had ready access to advice. We heard no evidence or submissions to persuade the tribunal to extend time on the grounds that it was just and equitable to do so.

The law

Disability definition

76. 'Disability' is defined at S.6 and Schedule 1 of the Equality Act 2010 (EA 2010). Section 6:

1)A person (P) has a disability if—

(a)P has a physical or mental impairment, and

(b)the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

77. The burden of proving disability is on the Claimant. He must show that at the material time he had a physical or mental impairment which had a long term and substantial adverse effect on his ability to carry out normal day to- day activities. Whether the Claimant had a disability is a matter for the tribunal to determine rather than a medical professional (Abadeh v British Telecommunications plc [2001] IRLR 23).

78. In Goodwin v Patent Office [1999] I.C.R. 302 Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995. Morison J set out four questions to be answered by the Tribunal in order. This four-stage approach was approved more recently by the Court of Appeal in Sullivan v Bury Street Capital Limited [2021] EWCA Civ 1694, where Singh LJ listed the questions as:

Was there an impairment? (the 'impairment condition');

What were its adverse effects [on normal day-to-day activities]? (the 'adverse effect condition');

Were they more than minor or trivial? (the 'substantial condition');

Was there a real possibility that they would continue for more than 12 months? (the 'long-term condition').

79. Underhill J (President) in J v DLA Piper UK LLP 2010 WL 2131720 suggested (para [40]) that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, as recommended in Goodwin, there will generally be no need to actually consider the 'impairment condition' in detail:

"In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the claimant's ability to carry out normal day-to-day activities has been adversely affected on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues."

80. In Goodwin Morison J warned of the risk of "disaggregating" the 4 questions – i.e. whilst they can be addressed separately, it is important not to forget the purpose of the legislation, and to look at the overall picture. This warning was emphasised by HHJ Tayler more recently in Mr A Elliot v Dorset County Council, UKEAT/0197/20/LA.

81. The Guidance suggests that a number of factors will be relevant when considering whether any adverse impact on normal day-to-day activities is substantial, including the time taken to carry out an activity and the way in which an activity is carried out. The focus is on the things that the person cannot do, or can only do with difficulty (rather than on the things that the person can do) (Paterson v Commissioner of Police for the Metropolis [2007] IRLR 763, at 39).

82. As to what is meant by 'normal day to day activities,' paragraphs D3-4 of the Guidance say:

'In general, normal day to day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport and taking part in social activities. Normal day to day activities can include in general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or shift pattern.

83. The question of whether there is a "substantial" adverse effect is a question of fact for the tribunal to determine. Section 212:

(1) In this Act.... 'substantial' means more than minor or trivial.

84. The Guidance says this about the effects of treatment:

B12. The Act provides that, where an impairment is subject to treatment or correction, the impairment is to be treated as having a substantial adverse effect if, but for the treatment or correction, the impairment is likely to have that effect. In this context, 'likely' should be interpreted as meaning 'could well happen'. The practical effect of this provision is that the impairment should be treated as having the effect that it would have without the measures in question (Sch1, Para 5(1)). The Act states that the treatment or correction measures which are to be disregarded for these purposes include, in particular, medical treatment and the use of a prosthesis or other aid (Sch1, Para 5(2)). In this context, medical treatments would include treatments such as counselling, the need to follow a particular diet, and therapies, in addition to treatments with drugs. (See also paragraphs B7 and B16.)

85. In deciding what effect an impairment would have had without the benefit of treatment, the Court of Appeal in Woodrup v London Borough of Southwark [2002] EWCA Civ 1716, held that the question was whether, if treatment had been stopped at the relevant date, the person would (despite the benefit obtained from prior treatment) have an impairment which had the relevant effect. At paragraph 13, Simon Brown LJ said:

"In any deduced effects case of this sort the claimant should be required to prove his or her alleged disability with some particularity. Those seeking to invoke this particularly benign doctrine....should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of

case, one would expect clear medical evidence to be necessary.”

86. The effect of an impairment is taken to be long term if it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected. Paragraphs C1 to C11 of the Guidance address the meaning of “long-term”, including the likelihood of effects lasting for at least 12 months, or of recurring. At C4 the Guidance says:

“In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual (for example general state of health or age).”

87. Whether or not an impairment has a substantial adverse effect, and whether that substantial adverse effect is long term is to be judged by reference to the facts and circumstances existing at the date of the alleged discriminatory acts. The tribunal is not entitled to have regard to events occurring after the date of alleged discrimination to determine whether the effect did (or did not) last for 12 months (All Answers Ltd v (1) Mr W (2) Ms R [2021] EWCA Civ 606, per Lewis LJ at paragraph 26, applying McDougall v Richmond Adult College [2008] EWCA).

Reasonable adjustments

88. S.20 and 21 Equality Act 2010 place a duty on an employer to make reasonable adjustments where a provision, criterion or practice or a physical feature 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.

Harassment

89. Section 26 Equality Act 2010 provides:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

....

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

90. The EAT in Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT, gave some guidance as to how the 'effect' test should be applied. It noted that the claimant must actually have felt, or perceived, his or her dignity to have been violated or an adverse environment to have been created. If the claimant has experienced those feelings or perceptions, the tribunal should then consider whether it was reasonable for the claimant to feel that way. If the tribunal finds that there was no such effect, then that will be an end to the matter.

Time limits

91. The time limit for discrimination claims is set out at s.123 of the EA 2010, (subject to ACAS early conciliation provisions):

123 (1)... proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

.....

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of that period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

92. The position relating to time limits for reasonable adjustments was considered by the Court of Appeal in Matuszowicz v Kingston Upon Hull City Council [2009] ICR 1170. There was no clear moment in time where the employer consciously decided not to make the adjustment in question. This engaged section 123(4) which specifies when a person is deemed to have decided to fail to do something. There are two alternatives:
(a) when the person does an act inconsistent with making the adjustment;
or
(b) at the end of the period in which the person might reasonably have been expected to have made the adjustment.

Conclusions

Disabilities

93. We found that the claimant had the disability of sciatica within the meaning of the Equality Act for the relevant period which is April 2022 to 30 June 2022 and that the respondent had knowledge of it.

94. We found that he did not have the disabilities of claustrophobia, depression or hypertension within the meaning of the Equality Act at the relevant time.

95. The disability of sciatica is potentially relevant to the claim for reasonable adjustments to the chair but is not relevant to the issue of the office. The claimant relies on claustrophobia for the office issue and we have found that was not a disability at the relevant time. Accordingly, the claim for a reasonable adjustment of the provision of a more spacious and private office with windows providing natural air and light is not upheld. In any event, the claim would be out of time as time starts to run from 30 June 2022 as that was when the decision was made not to give him a different office. It was over three months before he contacted Acas after that.

- 96. We decided that the chair, as recommended by Posturite and eventually supplied, was not a necessary reasonable adjustment in terms of the provisions of the Equality Act because we found that the chair that he had been using was not putting him at a substantial disadvantage. In any event, that claim would be out of time as time started to run from when Jim Small the risk assessment on 22 April 2022 and the claimant did not commence proceedings within three months of that time.
- 97. We found that it would not be just and equitable to extend time in this case, having heard no evidence from the claimant on the reason for delay.
- 98. The claimant was a union representative, he was already bringing grievances about the size of the office, and we heard no evidence to suggest that he was not capable of bringing proceedings earlier.
- 99. We do not make a finding on whether it is the respondent's responsibility to provide an office and a chair to a union representative on the days that he is stood down. It is not necessary for us to do so in this case.
- 100. With regard to the claimant's claim for harassment we found that the claimant and his witness were not specific about the words used. The appeared innocuous. He referred to the tone in which they were said but we were not persuaded that Mr Wilson spoke to the claimant in an unprofessional manner. Further, we find that it was not reasonable for the claimant to take offence either at what was said or how it was said or the fact that a risk assessment was being carried out. In addition, that claim is out of time having occurred on 22 April 2022.
- 101. In summary, the claimant's claims are not upheld, and the case is dismissed and that is the conclusion of the tribunal's judgment.

Approved by:

Employment Judge S Matthews

3 February 2025

REASONS SENT TO THE PARTIES ON
4 February 2025

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the

sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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:

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