EMPLOYMENT TRIBUNALS

Claimant: Mr James Eyles

Respondent: Ministry of Defence

Heard at: Cambridge Employment Tribunal (hybrid: in person and by CVP)

On: 28, 29 and 30 April 2025, 1, 2, 6, 7, 8, 9, 12, 13 and 19 May (12 hearing days)
14, 20 and 28 May 2025 (3 deliberation days)

Before: Employment Judge Hutchings
Tribunal Member Mrs J Buck
Tribunal Member Mrs C. Smith

Representation
Claimant: in person
Respondent: Ms A. Williams, counsel

RESERVED JUDGMENT

It is the unanimous judgment of this Employment Tribunal that:

1. The claimant was a disabled person as defined by section 6 Equality Act 2010 because of PTSD, depression, anxiety and paranoia from 3 December 2021.

2. The complaint of direct disability discrimination is not well-founded and is dismissed.

3. The complaint of harassment related to disability is not well-founded and is dismissed.

4. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

5. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

6. The complaint of victimisation is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant commenced employment with the respondent, a government department as a Defence Accommodation Stores DAS Manager (Europe) – HEO from 9 March 2020. He remained in this role, based at SHAPE in Belgium, until 16 July 2023. The claimant's employment continues with the respondent; he is now located in England.

2. The claimant has brought two claims, 3301405/2022, the "first claim", and 2212721/2023, the "second claim", which have been consolidated by the Tribunal in the interests of justice as parties and witnesses are common to both.

3. ACAS consultation in the first claim started on 13 January 2022 and a certificate was issued on 20 January 2022.

4. ACAS consultation in the second claim started on 15 July 2023 and a certificate was issued on 17 July 2023.

5. By an ET1 claim form and Particulars of Claim dated 10 February 2022 (first claim) and 20 July 2023 (second claim) the claimant makes the following claims:

    5.1. Disability discrimination claims:

        5.1.1. Direct discrimination: section 13 of the Equality Act 2010;
        5.1.2. Discrimination arising from disability: section 15 of the Equality Act 2010;
        5.1.3. Duty to make reasonable adjustments: section 20 Equality Act 2010;
        5.1.4. Harassment: section 26 of the Equality Act 2010; and
        5.1.5. Victimisation: section 27 of the Equality Act 2010; and

    5.2. Detriment for making a protected disclosure: section 47B of the Employment Rights Act 1996.

6. By an ET3 response form and Grounds of Resistance dated 13 April 2022 (first claim) and 1 September 2023 (second claim) and amended Grounds of Resistance dated 19 January 2024 the respondent denies the allegations.

7. The respondent accepts that the claimant was disabled by reason of PTSD, depression, anxiety and paranoia. The respondent accepts that it had knowledge of the claimant's PTSD, depression, anxiety and paranoia from 3 December 2021. The respondent accepts that the claimant was disabled by reason of chronic inflammatory bowel disease and dumping syndrome and it had knowledge of these conditions from the start of his employment (9 March 2020).

8. The respondent accepts that some of the factual events did take place either as described by the claimant (for example on 10 January 2023 Mrs Woffinden arranging a Formal Absence Review Meeting, the withdrawal in March 2023 of a job offer and the claimant not being presented with a good luck card); the respondent denies the events were in any way linked to or motivated by the claimant's disabilities. The respondent denies that other alleged events took place in the manner alleged by the claimant (for example the interactions on 7 October 2022 and 11 October 2022) or at all (for example the leaking of the June 2022 OH report).

Evidence and procedure

9. The case was listed for 14 days.

10. We considered the following documents which the parties submitted in evidence:

    10.1. An agreed initial hearing file of 2166 pages;

    10.2. An agreed supplemental hearing file of 711 pages; and

    10.3. The claimant's 2022 – 2023 PAR, admitted as evidence by consent on day 9.

11. The claimant represented himself and gave sworn evidence (days 2, 3, 4 and 5). He submitted a witness statement from Mark Lockyear, which was read by the Tribunal. Mr Lockyear did not provide evidence in his statement about any of the claimant's factual allegations; the focus of Mr Lockyear's statement is his opinion of the claimant and some of the respondent's witnesses. Neither Ms Williams nor the Tribunal had questions for Mr Lockyear about his evidence; therefore it was not necessary for Mr Lockyear to attend the hearing.

12. The respondent was represented by Ms Williams of counsel who called sworn evidence from:

    12.1. Sarah Stone - Deputy Head of Accommodation (day 6);
    12.2. John Roberts - Assisting Head Housing Support Services (day 6, 7 and 8);
    12.3. Alison Wood - Asset Capability Manager (day 8);
    12.4. Tanya Hickman - Housing Manager (day 8);
    12.5. Sarah Woffinden - Senior Facilities Manager within the Defence Infrastructure Organisation (day 9);
    12.6. John Cook - Head of Cyber Security Assurance and Advice Services (at the time of the allegations (day 10);
    12.7. Melanie Colquhoun, of the Ministry of Defence (MoD) RD Accommodation, DIO Estate Lease Strategy, Defence Infrastructure Organisation (day 10); and
    12.8. Dean Kelly-Smith - Civilian in the position of Operations Manager, in the Land Readiness Fleet in Sennelager, Germany (day 13).

13. The respondent prepared a neutral cast list and chronology to assist the Tribunal and the claimant, mindful he was not represented.

14. Mr Kelly-Smith is based in Germany. On day 1 Ms Williams explained to the Tribunal that the respondent's solicitor had made an application to the German authorities pursuant to the Employment Tribunal Presidential Guidance "Taking Oral Evidence by Video or Telephone from Persons Located Abroad", as Germany is a country which requires the state's permission to be sought on an individual basis. It is noted that, pursuant to this guidance, the respondent must contact the relevant authorities of that state to ask whether they give permission for a witness to give oral evidence from within its territory. Ms Williams explained that the respondent had not yet received a response from the relevant authority and had renewed its application. Ms Williams updated the Tribunal throughout the hearing. On day 9 (when all witnesses had given evidence except Mr Kelly-Smith) Ms Williams told us that the respondent had still not received a response to either request, meaning the respondent did not have the necessary authority for Mr Kelly-Smith to give evidence from Germany. The claimant confirmed that he had questions for Mr Kelly-Smith about the evidence in his witness statement.

15. On day 10 Ms Williams told us that, subject to the Tribunal's permission, Mr Kelly-Smith would fly to Heathrow on 19 May (day 13 of the hearing) and travel to Ms Williams' chambers where he could give evidence remotely. Ms Williams explained that by attending the hearing remotely Mr Kelly-Smith could return to Germany the same day; this would be more difficult should the Tribunal require Mr Kelly-Smith to travel to the Employment Tribunal in Cambridge. The claimant did not object to this approach. We agreed it was not proportionate in all the circumstances for Mr Kelly-Smith to travel to Cambridge.

16. On day 3 Ms Williams gave to the claimant and the Tribunal a neutral table summarising the factual allegations and the respondent's position in relation to each.

17. On day 9 parties agreed to admit the claimant's timesheet for the week commencing 10 October 2022 as evidence with the Tribunal's consent; the respondent did so on the basis the timesheet was not final.

18. On day 11 Ms Williams and the claimant gave an oral closing statement to the Tribunal.

19. On day 12, with the agreement of the parties, we commenced deliberations notwithstanding that we were yet to hear Mr Kelly-Smith's evidence. The reasons for interjecting a day of deliberations are:

    19.1. 14 May 2025 is an allocated hearing day and it is in the interests of justice (to ensure timely delivery of a decision) that the Tribunal uses the time allocated to it;

    19.2. The delay in Mr Kelly-Smith's evidence is not the fault of either party and so it would not be fair or just to delay without good cause, as such a delay is likely to result in the Tribunal having insufficient time to conclude its decision in the hearing window, thereby resulting in a delay (possibly for several weeks or months, subject to locating an available date for the panel to reconvene) to the decision; and

19.3. Mr Kelly-Smith's evidence goes to a discrete point (issues 2.1.13,3.1.3, 4.2.2) which is based on an isolated factual allegation that in March 2023 the respondent withdrew a job offer made on 7 December 2022 of an SO2 post in Sennelager as a Field Contract Repair Department Manager on medical grounds, namely grounds of alcohol misuse disorder and self-harm. The withdrawal of the job offer is admitted by the respondent. The respondent says the withdrawal was on the basis that the claimant could not be medically supported in the role. Mr Kelly-Smith's evidence is relevant to the reason for the withdrawal of the job offer only. It is not relevant to any other allegations. Therefore, we considered that, on day 12, the panel could begin making findings of fact on the other alleged events without any reference to this allegation.

20. We discussed this approach with the parties; neither objected.

Preliminary applications

21. By email dated 23 March 2025 the respondent made a request for Mrs Wood and Mr Cook to give evidence by CVP, which was granted by the Tribunal.

Hearing Timetable

22. An outline timetable was set out in the case management order of Employment Judge Ord (dated 14 November 2023), which we largely followed, starting the claimant's evidence on day 2 (the Tribunal having spent day 1 reading the documents).

23. The Tribunal took regular breaks, starting at 10am and finishing around 4pm each day. At the start of the hearing on day 1 we discussed any reasonable adjustments required by witnesses. The claimant required immediate breaks without notice due to his condition of chronic inflammatory bowel disease and dumping syndrome. The respondent's witnesses did not require any additional adjustments.

List of issues

24. At the start of the hearing we finalised the draft list of issues as follows; the italic comments are clarifications provided by the claimant during the hearing.

1. Disability

1.1 The Respondent accepts that Mr Eyles was disabled by reason of PTSD, depression, anxiety and paranoia. The Respondents accept that they had knowledge of the Claimant's PTSD, Depression, Anxiety and Paranoia (the "mental impairments") from 3 December 2021. *The claimant says he told John Roberts that he had these mental impairments at a meeting on 3 March 2020.*

1.2 The respondent accepts that Mr Eyles was disabled by reason of chronic inflammatory bowel disease and dumping syndrome (the "physical impairments") and that they had knowledge of this from the start of his employment (9 March 2020).

2. Direct Disability Discrimination

2.1 Mr Eyles relies upon the following allegations as allegations of direct discrimination:

2.1.1 Demotion and removal of Team. The Claimant cannot state with certainty who made those decisions but believes that Mr John Roberts and Ms Sarah Stone either implemented or made the relevant decision in May 2021; *(the claimant confirmed this relates to issues 2.1.4 and 2.1.8);*

2.1.2 Rejection for an interview for DIO ESH Housing Manager post in November 2022;

2.1.3 In March 2023 withdrawing the job offer made on 7 December 2022 of an SO2 post in Sennelager as a Field Contract Repair Department Manager on medical grounds, namely grounds of alcohol misuse disorder and self-harm;

2.1.4 John Roberts' decision to remove the Claimant's responsibility for the Sennelager team on 19 May 2021; *(the claimant confirmed this relates to issues 2.1.1 and 2.1.8);*

2.1.5 John Roberts' questioning of the Claimant's ability to manage a Team of "friends" in a discussion with Jane Annis on or around 1 July 2022;

2.1.6 Mr John Roberts informing staff the Claimant was a risk to them on or around 3 February 2022;

2.1.7 Mr John Roberts rebuking (*the claimant says the rebuke was "I see you have your work clothes on")* the Claimant for his attire on or around 18 September 2021 at Shapefest; *the claimant told the Tribunal that this factual allegation relates to his physical impairments and not his mental impairments;*

2.1.8 Mr John Roberts and Ms Sarah Stone in April 2021 restricting the Claimant to menial duties; *(the claimant confirmed this relates to issues 2.1.1 and 2.1.4 and that menial duties was the loss of responsibility for part of his team / managing a small store in Germany);*

2.1.9 Ms Melanie Colquhoun and Mr John Roberts dismissing, in email correspondence on or around 1 September 2021, the Claimant's advice when he was sent to assess the health and safety requirements of a house in Ulm and warned of stranger danger upon return; *the claimant confirmed that the 1 September 2021 email he relies on in this factual allegation is the email timed at 9.07 (page 393 of the hearing file, advice that the garden fence is not fit for purpose);*

2.1.10 Mr John Roberts, in April 2022 *(the claimant confirmed the year as 2022 and not 2021)*, dismissing, in email correspondence *(hearing file 505 to 507)*, the Claimant's advice that finances needed to be investigated following an unauthorised approval of a purchase by Ms Tanya Hickman; *the claimant confirmed that the reference to April 2021 in the agreed list of issues is a typographical error and the correct date is April 2022 (as referred to in his witness statement). The claimant withdrew this factual allegation on day 6 of the hearing;*

2.1.11 Mr John Roberts threatening the Claimant with police action, due to accusations of fraud against his team, in or around April 2021; *the claimant told the Tribunal that this factual allegation relates to his mental impairments and not his physical impairments; the claimant confirmed that the accusations are in the email chain at page 319 of the hearing file;*

2.1.12 Mr John Roberts belittling the Claimant in front of colleagues Ms Melanie Colquhoun and Ms Tanya Hickman in a meeting in or around April 2021, namely by saying *"I don't want to pull rank but I'm a B2, you need to show me some respect"*; *the claimant confirmed to the Tribunal that this factual allegation relates to his mental impairments and not his physical impairments;*

2.1.13 John Roberts, on or around 1 July 2022, ordering the Claimant to wear the uniform of a DIO Labourer *(polo shirt)*, via Sarah Woffinden, the Claimant's line manager.

2.2 Insofar as these allegations are upheld by the Tribunal, the question will be whether those events amounted to, "less favourable treatment"? In other words, did the Respondent treat Mr Eyles less favourably than it treated or would have treated others, ("comparators") in not materially different circumstances? Alternatively, would the Respondent have treated a hypothetical person in such circumstances more favourably?

2.3 If Mr Eyles was treated less favourably, the Tribunal would then ask whether the reason for that difference in treatment was that he was disabled?

3. Harassment

3.1 Did the Respondent engage in conduct as follows:

3.1.1 Demotion and removal of Team. The Claimant cannot state with certainty who made those decisions but believes that Mr John Roberts and Ms Sarah Stone either implemented or made the relevant decision in May 2021; *(the claimant confirmed this relates to issues 3.1.4 and 3.1.8);*

3.1.2 Rejection for an interview for DIO ESH Housing Manager post in November 2022;

3.1.3 In March 2023 withdrawing the job offer made on 7 December 2022 of an SO2 post in Sennelager as a Field Contract Repair Department Manager on medical grounds, namely on grounds of alcohol misuse disorder and self-harm;

3.1.4 Mr John Roberts' decision to remove the Claimant's responsibility for the Sennelager team on 19 May 2021; *(the claimant confirmed this relates to issues 3.1.1 and 3.1.8);*

3.1.5 Mr John Roberts' questioning of the Claimant's ability to manage a Team of "friends" in a discussion with Jane Annis on or around 1 July 2022;

3.1.6 Mr John Roberts informing staff the Claimant was a risk to them on or around 1 July 2022;

3.1.7 Mr John Roberts rebuking *(the claimant says the rebuke was "I see you have your work clothes on")* the Claimant for his attire on or around 18 September 2021 at Shapefest; *the claimant confirmed to the Tribunal that this factual allegation relates to his physical impairments and not his mental impairments;*

3.1.8 Mr John Roberts and Ms Sarah Stone in April 2021 restricting the Claimant to menial duties; *(the claimant confirmed this relates to issues 3.1.1 and 3.1.4 and that menial duties was the loss of responsibility for part of his team / managing a small store in Germany);*

3.1.9 Ms Melanie Colquhoun and Mr John Roberts dismissing, in email correspondence on or around 1 September 2021, the Claimant's advice when he was sent to assess the health and safety requirements of a house in Ulm and warned of stranger danger upon return; *the claimant confirmed that the 1 September 2021 email he relies on in this factual allegation is the email timed at 9.07 (page 393 of the hearing file, advice that the garden fence is not fit for purpose);*

3.1.10 Mr John Roberts, in April 2022 *(the claimant confirmed the year as 2022 and not 2021)*, dismissing, in email correspondence *(hearing file 505 to 507)*, the Claimant's advice that finances needed to be investigated and disposals and assets to be managed correctly, following an unauthorised approval of a purchase of kitchen equipment and the erection of wardrobes by the DAS Labourers by Ms Tanya Hickman and Mr John Roberts; *the claimant confirmed that the reference to April 2021 in the agreed list of issues is a typographical error and the correct date is April*

2022 (as referred to in his witness statement). The claimant withdrew this factual allegation on day 6 of the hearing;

3.1.11 Mr John Roberts threatening the Claimant with police action, due to accusations of fraud against his team, in or around April 2021*; the claimant confirmed to the Tribunal that this factual allegation relates to his mental impairments and not his physical impairments; the claimant confirmed that the accusations are in the email chain at page 319 of the hearing file;*

3.1.12 Mr John Roberts belittling the Claimant in front of colleagues Melanie Colquhoun, Tanya Hickman in a meeting in or around April 2021, namely by saying *"you need to show me some respect, I'm your B2, you need to show me some respect"*;

3.1.13 Mr John Roberts, on 1 July 2022, ordering the Claimant to wear the uniform of a DIO Labourer *(polo shirt)*, via Sarah Woffinden, the Claimant's line manager;

3.1.14 On 7 October 2022 Ms Sarah Stone and Mr John Roberts visited the Claimant in the stores and on or around 10 October 2022 Mr John Roberts and Ms Sarah Woffinden visited the Claimant in the stores; *at the hearing the claimant told us the correct date is 11 October, which was not disputed by the respondent;*

3.1.15 On 8 October 2021 Mr John Roberts belittled and scolded the Claimant by telling him that he was incompetent and that it was his mess to sort out;

3.1.16 Failed to separate the Claimant and Mr John Roberts despite the Claimant putting in a bullying and harassment complaint against Mr John Roberts in December 2021;

3.1.17 On 27 July 2022 Sarah Woffinden leaked details of the Claimant's June 2022 Occupational Health Report to Mr John Roberts without consent;

3.1.18 On 27 April 2023 Mr John Roberts and Ms Sarah Woffinden submitted a PAR which was defamatory, dishonest, discriminatory and prejudiced because it alluded to the Claimant's "periods of absence" and "inability to achieve performance goals", and gave the Claimant an overall rating of "partially met";

3.1.19 On 16 July 2023 the Claimant was not presented with a Good Luck card or presentation.

3.2 If so, was that conduct unwanted?

3.3 If so, did it relate to Mr Eyles' disability?

3.4 If so, did the conduct have the purpose or, (taking into account Mr Eyles' perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating Mr Eyles' dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

4. Disability Related Discrimination (disability arising section 15)

4.1 Did the following things arise in consequence of Mr Eyles' disability:

4.1.1 Periods of absence through ill health;

4.1.2 Being deemed medically unsupportable;

4.1.3 Being considered less capable; and

4.1.4 Wearing less formal items of clothing? *The claimant confirmed that this arose in consequence of his physical impairments and the consequences of those impairments.*

4.2 If so, did the Respondent treat Mr Eyles unfavourably as follows:

4.2.1 Ms S Woffinden in November 2022 threatening him in respect of his sickness absence; *the claimant confirmed that this allegation links to 4.1.1 (period of absence through ill health) and sending him a letter to attend a sickness absence meeting that made a reference to the potential consideration of formal action being taken;*

4.2.2 In March 2023 withdrawing the job offer made on 7 December 2022 of an SO2 post in Sennelager as a Field Contract Repair Department Manager on medical grounds, namely grounds of alcohol misuse disorder and self-harm;

4.2.3 Mr John Roberts' decision to remove the Claimant's responsibility for the Sennelager team on 19 May 2021;

4.2.4 Mr John Roberts' questioning of the Claimant's ability to manage a Team of "friends" in a discussion with Jane Annis on or around 1 July 2022;

4.2.5 Mr John Roberts informing staff the Claimant was a risk to them on or around 1 July 2022;

4.2.6 John Roberts rebuking (*the claimant says the rebuke was "I see you have your work clothes on")* the Claimant for his attire on or around 18 September 2021 at Shapefest; *the claimant informed the Tribunal that this factual allegation relates to his physical impairments and not his mental impairments;*

4.2.7 Restricting Mr Eyles' duties to menial tasks *(the loss of responsibility for part of his team / managing a small store in Germany*, in or around April 2021 by John Roberts and Sarah Stone;

4.2.8 Ms Melanie Colquhoun and Mr John Roberts dismissing, in email correspondence, the Claimant's advice when he was sent to assess the health and safety requirements of a house in Ulm and warned of stranger danger upon return on or around 1 September 2021; *the claimant confirmed that the 1 September 2021 email he relies on in this factual allegation is the email timed at 9.07 (page 393 of the hearing file, advice that the garden fence is not fit for purpose);*

4.2.9 Mr John Roberts, in or around April 202*2 (the claimant confirmed the year as 2022 and not 2021)*, dismissing, in email correspondence *(hearing file 505 to 507)*, the Claimant's advice that finances needed to be investigated and disposals and assets to be managed correctly, following an unauthorised approval of a purchase of kitchen equipment and the erection of wardrobes by the DAS Labourers by Ms Tanya Hickman and Mr John Roberts; t*he claimant confirmed that the reference to April 2021 is a typographical error and the correct date is April 2022 (as referred to in his witness statement). The claimant withdrew this factual allegation on day 6 of the hearing;*

4.2.10 Ms Tanya Hickman dismissing the Claimant's opinion in or around April 2021 *(hearing file reference 2007 – 2009)*, that flat-packed furniture should be constructed by his team's labourers because that would save tax payers' money and speed the process up;

4.2.11 Mr John Roberts, in comments on 1 July 2022 to Jane Annis, viewing the Claimant's mental health disability as *"a problem"* and saying that he had *"days when he was very happy and days when he was not." The claimant confirmed this links to 4.1.3 (being considered less capable);*

4.2.12 On 26 November 2022 Ms Sarah Woffinden tried to arrange a Continuous Absence Review Meeting as a result of the Claimant being sick from 18 October – 27 November 2022;

4.2.13 On 10 January 2023 Ms Sarah Woffinden arranged a Formal Absence Review Meeting in relation to the previous year's sickness absence.

4.3 If so, did the Respondent treat Mr Eyles unfavourably in any of those ways because of the above things arising in consequence of his disability?

4.4 If so, has the Respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The Respondent relies on the following as his legitimate aim:

4.4.1 Maintaining appropriate standards of conduct in the workplace and safeguarding its employees.

4.4.2 Ensuring a safe and appropriate working environment for its employees.

4.4.3 The need to run and provide an efficient service.

4.4.4 Properly managing frequent absences.

4.4.5 Mitigating the impact of short term and/or frequent absences on other employees.

4.4.6 Ensure the capability process supports and manages employees in a fair and consistent manner.

4.4.7 Enabling the effective accomplishment of the various functions of the Respondent.

4.4.8 The effective control and management of the Respondent's finance.

4.4.9 Ensuring that employees wear appropriate clothing at the workplace to promote a positive and professional image.

4.4.10 Adhering to health and safety standards.

5. Failure to Make Reasonable Adjustments

5.1 A "PCP" is a provision, criterion or practice, (a way of doing things). Did the Respondent have the following PCPs:

5.1.1 A requirement to work in an office?

5.2 If so, did any such PCP put Mr Eyles at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that he was unable to cope with the stress of facing those against whom he had raised a Grievance?

5.3 If so, did the Respondent know or could it reasonably have been expected to know, that Mr Eyles was likely to be placed at any such disadvantage?

5.4 If so, were there steps that were not taken that could have been taken by the Respondent to avoid any such disadvantage? Mr Eyles identifies the following reasonable adjustments, [although the Tribunal is not limited to considering these reasonable adjustments only]:

5.4.1 Allowing him to work from home?

5.5 If so, would it have been reasonable for the Respondents to have to taken those steps at any relevant time?

6. Victimisation

6.1. Did Mr Eyles' do a Protected Act in that:

6.1.1. in April 2021 he emailed Mr John Roberts and Ms Sarah Stone saying that he was going to make a formal Grievance;

6.1.2. in December 2021 he raised a formal Grievance;

6.1.3. In February 2022 he issued proceedings raising grounds of discrimination under the Equality Act 2020 in the Employment Tribunal.

6.2. Mr Eyles relies upon the following as detriments inflicted on him because of the Protected Act(s):

6.2.1. Following the email in April 2021, Mr John Roberts made the decision to remove the Claimant's responsibility for the Sennelager team on 19 May 2021;

6.2.2. Following the email in April 2021, the Grievance in December 2021 and the issuing of proceedings in February 2022, in or around September 2022 the Claimant was told that his tour would not be extended for an extra two years.

7. Time

7.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before the following dates may not have been brought in time:

7.1.1 claim number 3301405/2022 any complaints pre-dating 14 October 2021; and

7.1.2 claim number 2212721/2023, any complaints pre-dating 16 April 2023.

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

7.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
7.2.2 If not, was there conduct extending over a period?
7.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

7.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

7.2.4.1 Why were the complaints not made to the Tribunal in time?

7.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

8. Remedy

8.1 What financial losses has the discrimination caused?
8.2 Has Mr Eyles taken reasonable steps to replace lost earnings, for example by looking for another job?
8.3 If not, for what period should Mr Eyles be compensated?
8.4 What injury to feelings has the discrimination caused Mr Eyles and how much compensation should be awarded for that?
8.5 Is there a chance that Mr Eyles' employment would have ceased anyway in any event? Should the compensation be reduced as a result?
8.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
8.7 If so, did the Respondent or Mr Eyles unreasonably fail to comply with it?
8.8 If so, is it just and equitable to increase or decrease any award payable to Mr Eyles?
8.9 If so, by what proportion, up to 25%?
8.10 How much interest should be awarded?

Findings of fact

Credibility

25. All parties were keen to assist the Tribunal, answered the questions put to them and were transparent in sharing their recollections of the events. In assessing any discrepancies in evidence, we are mindful that several years have passed since the alleged events complained about.

Factual findings

<u>Employment</u>

26. The claimant started employment with the respondent on 9 March 2020 and remains employed by them. For the period of the events about which he complains, the claimant was based at SHAPE in Belgium as a Defence Accommodation Stores DAS Manager (Europe) – HEO. He left this post on 16 July 2023 having completed the initial 3 year post and having been refused an extension. In evidence the claimant told us that he was a UK civil servant who had been posted to Belgium with responsibility for defence accommodation assets, primarily providing furniture and soft furnishings to British MOD and NATO service families and staff.

27. We have considered the claimant's job description at the start of the role. He accepted the scope of this role as procurement, management, distribution and

safeguarding and that accepted a separate team was responsible for housing and facilities management. During his tenure the claimant confirmed his role required him to work in a large warehouse (storing the furniture, the "stores"), adjacent office and sometimes in the shop. The job description refers to the fact that, when he started the role on 9 March 2020, the claimant had responsibility for teams based at Sennelager in Germany and SHAPE in Belgium; the claimant was based at SHAPE.

Disability

28. The respondent accepts that Mr Eyles was disabled by reason of PTSD, depression, anxiety and paranoia. The claimant says he told Mr Roberts that he had these mental impairments at a meeting on 3 March 2020, when they met prior to the start of his employment. The respondent accepts that it had knowledge of the claimant's PTSD, depression, anxiety and paranoia from 3 December 2021 when these mental conditions are recorded in an Occupational Health ("OH") report. Mr Roberts denies that the claimant told him about his mental conditions in March 2020, telling us that he:

    "*was not aware Mr Eyles suffered from PTSD, depression, anxiety and paranoia until later in his tour. I was aware of his attempted suicide in October 2021 but that was the extent of my knowledge at that time ….I was not aware of Mr Eyles' mental health condition until his suicide attempt in October 2021….*"

29. Mr Roberts told us that he did not discuss the claimant's mental conditions at the 3 March meeting, only his physical ones due to some commonality of conditions between them. At the hearing when Ms Williams suggested to the claimant he *"did not disclose to anyone in chain of command that he had depression, PTSD, paranoia and anxiety"* the claimant replied that he did and it is *"well documented".* We disagree. While there is discussion in some documents about the claimant feeling anxious on occasion, and the impact on his mental health of some events, there is no documentary evidence of the claimant telling his managers and colleagues that he had established mental health conditions of PTSD, depression, paranoia and anxiety at the start of his employment nor at any other point until the December 2021 OH report is received by the respondent.

30. The claimant's December 2021 grievance does not attribute the issues and conduct about which he complains to the alleged perpetrators' knowledge of his mental health conditions. Mr Cook, who considered this grievance, told us that his understanding from his initial contact with the claimant in this grievance process was *"that his mental health conditions had developed later* [than the alleged conduct] *and he alleged that the bullying (that was considered part of the complaint) had been the trigger for these mental health conditions."* Having considered the grievance, we agree.

31. We have read the December 2021 OH report. It states:

    "As you are aware Mr. Eyles has been off work since 09/10/21 after an attempt to take away his life as per referral. Mr. Eyles reports over 16 months he has suffered with mental health issues which has been triggered by work related stress."

32. 16 months before December 2021 is July 2020; we find that in the OH assessment the claimant indicated that his mental health conditions arose around July 2020. This accords with Mr Cook's records that, on balance, he preferred Mr Roberts' evidence that he had discussed the claimant's mental health with him on 2 occasions when it had *"flared up"* to the claimant's recollection Mr Roberts had been aware of the condition on *"multiple occasions".* Mr Cook told us that he:

    "…. did not consider that any of the behaviour subject to the upheld findings amounted to discrimination related to Mr Eyles' disability….did not consider that that the respondent's acted in the way they did because of Mr Eyles' health conditions."

33. Mr Cook's findings reflect the documentary evidence before the Tribunal that, while the claimant had some general discussions about his mental health, this was in the context of issues being a consequence of the way he says he was being treated in the workplace and he shared the resultant stress he felt with managers.

34. We have also considered his March 2021 PAR document. This records that the claimant says he was *"struggling mentally".* Mr Robert's evidence to the Tribunal aligns with the comments he made at the time in the line manager section of the PAR document, that he had put the reference down to the stresses of the job, the claimant's unhappiness at losing some of his team and his family being unhappy and not settling in. We find that this reference does not evidence that Mr Roberts was aware of the nature and scope (depression, anxiety, PTSD and paranoia) of the claimant's mental health conditions. No evidence was provided by the claimant that he requested any changes be made to those comments in the PAR.

35. Based on the reference in the December 2021, our reading of the claimant's December 2021 grievance, and the evidence of Mr Cook, which was not challenged by the claimant, and OH report that the issues with the claimant's mental health arose about 16 months sooner and the PAR document, we prefer Mr Roberts' recollection that the claimant did not disclose or discuss any mental health conditions at the March 2020 meeting. We find that he had concluded the claimant had mental health issues on learning of his suicide attempt in October 2021 but did not know the full extent of the concerns until the December 2021 OH report, which was ordered following his suicide attempt.

36. Based on the reference in the December 2021 OH report, our reading of the claimant's December 2021 grievance, and the evidence of Mr Cook, we find that, at this time, the claimant began experiencing mental health issues (July 2020). In these proceedings, the claimant has not set out reasons why he says the alleged perpetrators were motivated to behave in the manner alleged due to his mental health conditions. Rather, he has written and spoken about how his mental health conditions were a consequence of the alleged behaviour. Generally, we find that the claimant's mental health conditions were exacerbated by things which he perceived to be happening or were happening in the workplace (we refer to specifics in our factual findings below), rather than as a result of mental health conditions which already

existed at the start of his employment. This accords with Mr Cook's evidence that neither in the claimants December 2021 grievance document nor during the course of the investigation (December 2021 to the outcome on 30 September 2022) did the claimant *"explicitly say that* [the allegations] *were linked to the issues within his complaint or that the conduct that he complained of was motivated by the fact he had* [the physical conditions]". We note that some of the issues and conduct complained of in the December 2021 grievance are repeated in these proceedings.

37. The respondent accepts that Mr Eyles was disabled by reason of chronic inflammatory bowel disease and dumping syndrome from the start of his employment and that the respondents managers were aware that he had these conditions from the outset of his employment. Therefore, we do not need to make any findings about the claimant's physical conditions.

2021

Reference to police action

38. The claimant alleges that Mr Roberts threatened him with police action, due to accusations of fraud against his team, in or around April 2021. Mrs Hickman accepts that she raised concerns about a trip from Sennelager to Rammstein by members of the claimant's team and, in doing so, that she used the word fraud. There is no evidence before the Tribunal that there was a fraud and, in any event, there is no allegation about the use of this term before the Tribunal. Therefore, we do not need to make any findings about whether any conduct constituted fraud.

39. It is agreed that Mr Roberts, as the claimant's line manager at this time, considered the concern raised. The claimant says in doing so Mr Roberts threatened him with police action. At the hearing, the claimant confirmed the basis of his allegation is the email chain at pages 318 - 319 of the hearing file. We have considered the wording used by Mr Roberts. In an email dated 12 April 2021 (11.59) Mr Roberts writes:

"James,
I think this is a less formal approach I could have gone to the MOD Police. If there is nothing to worry about then this can be explained at a lower level from you. Your integrity is not in question and I think some cool needs to be kept here happy to attend a UKBC meeting if you feel the need."

40. It is important to consider the words used by Mr Roberts: *"….I could have gone to the MOD Police….."*. Mr Roberts does not say he will go to the police, nor that he was considering going to the police. It is also important to consider the context in which this email is sent: it is in response to an earlier email the claimant sent to Mrs Hickman and Mrs Colquhoun, to which Mr Roberts is copied, in which the claimant refences the need for time to prepare his defence to what he refers to as *"serious allegations made against a member of my team".* The claimant suggests that: *"whilst I respect your wish to document your suspicions, it would have been better, in the first instance, to have maybe taken a less formal approach."* The claimant told the tribunal he felt that the matter should have been managed via discussion rather than by email, which he considered to be formal. The email exchange evidences that

Mr Roberts was referring to police action in relative terms and in response to the claimant's suggestion he should have approached the matter differently. We agree with Mr Cook's finding in the grievance the claimant subsequently brought about this matter (December 2021) that the reference to police action was inappropriate and find that the comment was unnecessary in the context of the exchange.

41. However, the wording used by Mr Roberts is clear. Mr Roberts' evidence to the Tribunal aligns with the explanation he gave to Jane Annis when interviewed on 1 July 2022 as part of the investigations into the claimant's December 2021 grievance complaint. Mr Roberts told Mrs Annis that he *"mentioned police involvement, as where fraud is alleged, the MOD fraud Department are usually alerted immediately"* but that he *"did not take this course as he considered JE to be beyond reproach and that he would not be party to fraudulent behaviour".*

42. Given the clear wording in the email and the consistent explanations provided by Mr Roberts, we find that, while the reference to police action was unnecessary, it was not used as a threat, but rather to illustrate a point being made by Mr Roberts that there were more formal ways to address the concern raised by Mrs Hickman, than addressing the concerns as he did. Indeed, in the email Mr Roberts attempts to reassure the claimant, telling the claimant "*Your integrity is not in question…"*

43. Furthermore, we find that the claimant did not perceive it as a threat at the time given the contemporaneous reference to his feelings about his interactions with Mr Roberts recorded in a grievance document the claimant drafted in April 2021. In his witness statement the claimant refers to his "*Grievance and Dispute Resolution Letter"* in which he makes a formal complaint about Mrs Hickman's allegations. This document is dated 26 April 2021, 2 weeks after the email exchange in which Mr Roberts refers police action. The claimant states:

    "I felt so bad/ill/distressed about the events [from the content of the letter it is clear this is a reference to the allegation made by Mrs Hickman] of the w/c 12 April 2021, that I had to phone Roberts on Saturday (17 April) afternoon. Roberts' was a great source of support…."

44. For these reasons we find that there was no threat made of police action and, in any event, the claimant was not upset by the reference to police action at that time.

April 2021 draft grievance

45. The claimant says that in April 2021 he emailed Mrs Stone and Mr Roberts saying that he was going to bring a formal Grievance. We read the email dated 30 April 2021 (page 1218 of the hearing file) the claimant sent to Mrs Stone in which he sets out his concerns over Mrs Hickman's comment that some of the practices within his team were bordering on fraudulent. This email is not sent or copied to Mr Roberts. We have also seen the draft grievance document dated 26 April 2021 (page 341 of the hearing file), which was not sent at this time or at all.

46. The claimant relies on these communications as a protected act; the respondent does not accept these emails constitute a protected act. We have considered the contents of the emails. We find that the claimant complains about the fact that Mrs Hickman raised concerns there may have been fraudulent activity on the claimant's team. Specifically, the claimant raises concerns about his professional integrity, stating:

    "These accusations, without foundation, are fully damaging to my reputation in Germany as I Drewdown (sic) all the MOD Schools and Settings in BFG. Managing the
    disposal and reallocation of millions pounds of assets was a highly responsible task, and thus the accusations made by Hickman have been done to cast doubt on my integrity; something, professionally and personally, I can't tolerate."

47. The claimant also references the impact of this incident, writing:

    "I felt so bad/ill/distressed about the events of the w/c 12 April 2021, that I had to phone Roberts on Saturday (17 April) afternoon. Roberts' was a great source of support, and he insisted he would speak to my team and would get Hickman to apologise, in writing, which is what I would have settled for at that juncture. However, as of 26 April 2021, no apology has been forthcoming, and my mental and physical health has degraded even more."

48. The claimant does not reference his PTSD, depression, paranoia or anxiety nor his physical conditions in this email or suggest that the issues raised by Mrs Hickman were motivated by or occurred as a consequence of these conditions.

Pulling rank comment

49. The claimant alleges that Mr Roberts belittled the claimant in front of colleagues Melanie Colquhoun and Tanya Hickman in a meeting in or around April 2021 by saying *"you need to show me some respect, I'm your B2, you need to show me some respect"*. Parties agree this was an audio call on 12 April 2021 and they did not use cameras so could only hear, not see each other. Mr Roberts accepts that he used these words. He denies he did so to belittle the claimant. He says the claimant was talking over him and becoming irate and he was trying to recover some order in the meeting. Mr Roberts accepted it was not a helpful comment in the circumstances, acknowledging this at the time by apologising shortly after. Mrs Hickman told us that the claimant was not allowing Mr Roberts or she to speak and she could hear from the tone and volume of the claimant's voice that he was becoming irate. Mrs Colquhoun was also on the call but not involved in the matters being discussed. Her recollection is that they *"were all talking over each other"* and *"did not listen to each other".*

50. As Mrs Colquhoun had no involvement in the matters being discussed we consider her a neutral observer. For this reason, we prefer her recollection that the meeting was tense and everyone was talking over each other. As the most senior person in the room, we find that Mr Roberts did say these words, effectively pulling rank, but he did so in an attempt to take control of the meeting in which the claimant was speaking over his colleagues and not

allowing his line manager to speak. We find that Mr Roberts appreciated the words were perhaps heavy handed hence apologising shortly thereafter, something the claimant accepts Mr Roberts did.

51. Indeed, in the claimant's draft grievance letter dated 12 April 2021 (which was never sent) the claimant refers to feeling belittled in this meeting but continues *"though, this has been dealt with to my satisfaction and had been included for accuracy."* We find that at the time the claimant did feel belittled, but he had accepted by Mr Roberts apology shortly thereafter and for this reason at the time he considered the matter closed.

Flat pack furniture

52. The claimant alleges that around April 2021 Mrs Hickman dismissed his opinion that flat-packed furniture should be constructed by his team's labourers because that would save tax payers' money and speed the process up. In his witness statement, the claimant does not refer to any written or verbal advice he sent/ gave to Mrs Hickman in April 2021, or at all, nor is there a document reflecting this before the Tribunal. Indeed, the claimant's recollection of the advice he says he gave in April is vague.

53. The respondent accepts there were, and we have seen, email exchanges between the claimant about Mrs Hickman in September 2021 in which they discuss whether the DAS labourers could build the flat pack wardrobes. Mrs Hickman's evidence to the Tribunal is that the wardrobes had been purchased under the claimant's management but when the Sennelager team transferred to her management in May 2021 the wardrobes had not been built so she sought to determine who was responsible for doing so. Therefore, mindful the claimant is not represented, we have considered whether the September 2021 email exchange amounts to advice. Mrs Hickman is seeking the claimant's help to resolve the building of the wardrobes and expresses her view at that time that:

    "*The labourers cannot build, no liability insurance, if the wardrobes collapsed onto to a SP DIO would be responsible. Can you please arrange for these wardrobes to be built*."

54. The claimant's response is, in our judgement, quite a strongly worded email not warranted by the wording of Mrs Hickman's email, in which he refers to having lost oversight of the Sennelager team in April 2021. The claimant does not state his view that the DAS labourers can build the wardrobes in this email. Indeed, the claimant's reference in September 2021 to the events of the previous April focuses on the loss of his team and responsibility for the wardrobes generally; he does not recall or reiterate any advice he says he gave Mrs Hickman in the April. Indeed, by chronology alone, he would not need to advise Mrs Hickman in the April as the task was in his remit at that time, prior to the transfer of the Sennelager team to Mrs Hickman.

55. In these circumstances, we consider that Mrs Hickman was not dismissing the claimant's advice. We find that, having taken over the Sennelager team and with it the wardrobe task, she was seeking to confirm that insurance was in place before instructing the build. In our judgement that is a sensible, reasonable, indeed necessary, approach where it concerns the safety of

colleagues and insurance cover. The tribunal heard evidence, confirmed by the claimant, that whether a task fell under a particular job description was of particular importance under German employment law. Given the importance of the matter, in our judgement she was right not to conclude the DAS labourers could build on the word of the claimant. It was reasonable (given she was new in the role and the claimant's admission that he did not have a direct handover with her) for Mrs Hickman to check the DAS labourers were covered by insurance.

56. For these reasons we find that the claimant did not give advice but rather engaged in a discussion about whether the labourers could build the wardrobes and became irritated that Mrs Hickman would not take his word that they could. Mrs Hickman was not dismissive; indeed she was seeking the claimant's help about a genuine concern she had.

Removal of Sennelager team from claimant's management

57. It is agreed that the claimant's role at the start of his employment included oversight of the DAS teams in Sennelager, Germany and SHAPE, Belgium. It is also agreed that, in May 2021, responsibility for the Sennelager team was removed from the claimant's management. It is agreed that a decision was taken to transfer housing delivery functions from DIO Accommodation (the claimant's team) to DIO Overseas and Training ("OS&Trg"), Mrs Hickman's team.

58. The claimant makes 3 factual allegations about this decision; he alleges that:

    58.1. the decision to remove his team was made and / or implemented by Mr Roberts and Mrs Stone, he says in May 2021;

    58.2. the removal of his team amounted to a demotion; and

    58.3. following the removal he was restricted to menial tasks. When the Tribunal sought clarification as to what the claimant meant by menial tasks he told us this included working in a small store in SHAPE where customers would come to collect things such as salt and carpet cleaner and the fact the Sennelager team was removed from his management.

59. In relation to the first, Mrs Stone told us that she made the decision to transfer housing delivery at Sennelager from ESG (and the claimant's team) to OS&T (and Mrs Hickman's team) along with Brigadier Bartholomew (head Overseas and Training), Air Cadre Savage (Head Accommodation) and Stuart Nash (B1 OS&Trg) and that they made this decision on 29 January 2021. The claimant accepted that he was not directly involved in the decision to remove the Sennelager team from his management. Mrs Stone told us that Mr Roberts was not involved in this decision. Indeed, the individuals Mrs Stone told us were involved in making the decision are all higher up the chain of command than the claimant and Mr Roberts.

60. The claimant suggested to Mrs Stone that the decision wasn't ratified in early 2021 and that it was decided locally to take the team off him. Mrs Stone's reply accorded with her written evidence that the decision was made in January; she continued *"it was agreed that there would be a phased transition*

and the delay in there being a full transfer and the financial decision was because there had been a delay in the overseas prime contract." The claimant seems to have misunderstood the June 2021 email to which he referred Mrs Stone; this supports that there was a phased transition, with Mrs Stone providing details of staff it had already been decided would transfer as the implementation date became close. There is nothing in the email to suggest the decision was taken at this time; the email evidences stakeholders working towards the implementation of an earlier decision.

61. The documents before us evidence that the decision [Tribunal emphasis] to remove the Sennelager team from the claimant's management was made as Mrs Stone explained.

62. We have seen an email dated 2 February 2021 from AC Savage to Mrs Stone in which AC Savage says:

"*Stuart* [Nash] *ran Barty* [Brigadier Bartholomew] *and me through the proposed approach to Germany. We both agreed we were happy to proceed with the recommended option* [Tribunal emphasis]*, but that we would also look at mutual support arrangements for the longer term in respect of the Naples School. Stuart and Barty didn't feel their team would have the capacity to take it on now, which would be the natural conclusion of the OPC-aligned model. However, they did agree that it was worth considering if we could agree arrangements aligned to the completion of a new-build school."*

63. In evidence the claimant suggested that the decision could not have been taken in January as this email identifies further matters for consideration. We disagree. The emphasised wording is clear: it evidences that the people Mrs Stone told us made the decision were in agreement that the team would be removed were and that consensus in this decision was confirmed on 2 February 2021.

64. This accords with Mrs Stone's evidence that there was a phased transition. We find this transition took place after the decision had been confirmed on 2 February 2021. The contemporaneous emails evidence that Mrs Stone was involved in the decision to remove the team but Mr Roberts was not. The transition was a general decision dating back to November 2020 (we have seen Mrs Stone's July 2022 interview in the grievance process which sets out at paragraph 16 and 17 the history of and explanation for the decision which accords with the evidence she gave in her witness statement and at the hearing) that there was a need to restructure the teams; ratification (that the transfer would happen at some point in the future) of that decision on 2 February 2021; and implementation of the decision (the actual transfer of line management for the Sennelager team).

65. For these reasons we find Mrs Stone was involved in the second stage: the decision to remove the team from the claimant's line management; Mr Roberts was not.

66. The decision was then communicated down the chain of command to Mr Roberts who, as the claimant's line manager at that time, accepts that he was tasked with implementing the decision. Given our finding that Mr Roberts was

not involved in making the decision, we find that his only involvement was communicating the decision and discussing the impact with the claimant.

67. It is clear, and understandable, that this decision upset the claimant. He has spoken of his disappointment and makes an allegation that after the removal of the Sennelager team he was restricted to menial duties. Mr Roberts told us that the claimant was disappointed with the decision, noting that "he enjoyed the management element of his role". The claimant alleges that the decision and implementation were motivated by knowledge of his disabilities. The decision was taken in February 2021. While the claimant has candidly shared with us the impact this decision had on his mental health, when asked why he considered the decision (and its implementation) related to his disabilities (in that for the claims before this Tribunal how his disabilities motivated the decision) the claimant told us the decision was because they wanted to force him out. He has not provided any explanation or documentary evidence to support this statement or that the decision and/or implementation was motivated in some way by his physical or mental conditions. We have found the decision was taken higher up the chain of command which Mrs Stone explained, The documents evidence the decision was motivated by a need to remove administrative issues resulting from SFA in Sennelager being managed under a contract run by OS&T and remaining ESG accommodation was outside the contract ESG were delivering.. The only motivation in Mr Roberts implementing the decision was a direction from higher up the chain of command.

68. Second, the claimant alleges that the removal of the Sennelager team from his management amounted to a demotion. We disagree. The claimant has been candid about how the decision to remove this team impacted him and he may have felt a loss in status due to having a smaller team. In cross examination he took issue with Mrs Stone's comment that he ran a small store in Belgium. This comment was taken out of context, Mrs Stone explaining that she was speaking in relative terms compared to storage facilities provided by Pickfords. In fact, while the removal of Sennelager did make the team and operation the claimant oversaw smaller, the claimant's job title and salary did not change and he retained line management responsibilities at SHAPE. There was no change in the chain of command: to move down the chain of command would be a demotion; this did not happen. The claimant had the same role, albeit it with a smaller team, which may have meant he could not execute some of the duties in his job description as before or at all. A change in responsibilities does not equate to a demotion, as the claimant suggests. Several key things about the claimant's role did not change: salary, title, some line management, same level of command. These evidence our finding that the claimant was not demoted.

69. Third, the claimant alleges that Mrs Stone and Mr Roberts restricted him to menial tasks. At the hearing the claimant told us he defined menial tasks as: *"Losing half my team. My job description remained same but did not mean I was able to do those things without German team."*

70. While we agree that the claimant's team was smaller, he retained line management responsibilities (not a menial role) and oversaw a team (albeit smaller, not a menial role). Furthermore, on 12 April 2021 Mr Roberts emailed the claimant suggesting a review of his job description to identify

changes to make it more interesting. Mr Roberts told us that the claimant did not reply; the claimant told us he did so verbally. In any event there is no documentary evidence that a meeting took place or record of the claimant's suggestion in reply to a written request. For this reason we find that the claimant did not take up Mr Roberts' suggestion. Mr Roberts also sought to expand the claimant's duties by adding additional health and safety responsibilities. While it is accepted by the respondent that the claimant's role had health and safety duties at the outset, Mr Roberts and Mrs Stone were instrumental in increasing this part of his role, as evidenced by his health and safety assessment of the Ulm property, something that the claimant admitted he had not done prior to the removal of the Sennelager team.

71. For these reasons, we find that while the decision to remove the Sennelager team (a decision only Mrs Stone inputted into) did alter the extent of the claimant's duties, it did not restrict him to menial duties. Indeed, it is a commercial reality that decisions are made higher up the chain of command which result in restructures below, and sometimes those on the receiving end of the management decisions which result in a change in tasks are not always happy.

Stranger danger

72. The claimant says he gave advice following his health and safety assessment of a house in Ulm, which was dismissed by Mrs Colquhoun and Mr Roberts in email correspondence on or around 1 September 2021. The concern raised is articulated by the claimant in an email to Mrs Colquhoun (and copied to Mr Roberts) sent at 7:21 on 1 September: he states:

"We need to:

- *Barrier to be inserted on to outside veranda (accessible from garden) to prevent child access;*
- *Insertion of a wooden mount is needed to allow erection of a child safety gate on the bottom basement stair which enables access to the garden (unable to be done on 19 Aug 21 due to insufficient lumber available).*

The garden fence (if that pictured is what's been installed) isn't fit for purpose, stranger danger, easy access for intruders, will not stop dogs or other animals."

73. The claimant told us the response that he takes issue with and which he says dismissed this advice is the email dated 1 September 2021 timed at 9:07 in which Mr Roberts replies:

"This "stranger danger" is a no goer we cannot provide homes that prevent any chance of injury or child abduction, 90% of our properties have chain link fencing and our families have no issues so can I please ask that no-one uses this term."

74. Mr Roberts says that his comment "*This "stranger danger" is a no goer"* did not amount to a dismissal of the claimant's advice but rather a response that the fences could not be make completely safe against the concerns raised and that his focus was a concern as to the appropriateness of the term

"stranger danger". Mrs Colquhoun told us that the concerns were not dismissed as work was subsequently undertaken at the property but the fence could not be made completely secure for the following reasons: properties are rented so the respondent must obtain landlord consent to any works so what was proposed and what was agreed with the landlord was different, taking account of the fences of other properties in the area and also had to take account of the fact works to properties were funded by tax payers money. We find that work was undertaken in 2021 to address the claimant's concerns in the context of these confines. While Mrs Colquhoun accepted there was no evidence that the the claimant was told the work had been carried out at the time, we have seen an email dated 23 March 2025 (page 2696)) when this was confirmed to him.

75. In all the circumstances, we find neither Mr Roberts nor Mrs Colquhoun dismissed the claimant's concerns about the fence as work was actioned to address these. Mr Roberts did raise concerns about the claimant's use of the phrase *"stranger danger"* ("*please ask that no-one uses this term"*). It is evident from the claimant's email in reply that it is this phrase he takes issue with; he replies: *" The term 'stranger danger' is a well-known phrase and as such is used throughout the MOD, education and home security".* While there is no evidence before the Tribunal to support or challenge this statement, we make the objective observation that the term is not helpful particularly as it is being used in the context of service families moving to a new location and is, in our judgment, unnecessarily alarming. Accordingly, notwithstanding it may or may not be a term in common usage within the MOD (as the claimant suggests) we agree with Mr Roberts assessment that it should not be usedin the circumstances.

Shapefest attire

76. The claimant alleges that Mr Roberts rebuked him by the words *"I see you have your work clothes on"* at the Shapefest social event on or around 18 September 2021. Mr Roberts admits he said this but in jest as the claimant often wore casual clothes to work. The claimant admitted he would wear shorts, T-shirts with slogans, tracksuit bottoms and football shirts when at work. Mr Roberts told us he often joked with the claimant about their respective football teams and as the claimant was wearing a football shirt at Shapefest the refence to work attire was in this context.

77. The claimant says this comment was in some way motivated by Mr Robert's knowledge of the claimant's physical conditions about which Mr Roberts accepts he was aware from their initial meeting on 3 March 2020. The claimant explained to us that due to the nature of his physical conditions he had to wear casual clothing and it was sometimes the case that due to the symptoms of his physical conditions it was necessary for him to change clothing during the course of the day. However, when giving evidence, the claimant admitted that he had not told Mr Roberts that his physical conditions resulted in a need to wear this clothing or change clothes nor had he made an application through the respondent's passport for reasonable adjustments process in respect of the same.

78. We find that Mr Roberts did make a comment about what the claimant was wearing at Shapefest, which he intended as a joke but which the claimant

received as a rebuke. In any event, given that the claimant admitted Mr Roberts did not know of any potential link between his clothing and his disability, the comment could not have linked in any way to this.

Lady Bathurst visit

79. The claimant alleges that on 8 October 2021 Mr Roberts belittled and scolded him by telling him that he was incompetent and that it was his mess to sort out. It is agreed that the reference to "mess" is the fact that lady Bathurst was scheduled to visit the stores at SHAPE to choose some furniture. Subsequent to the visit being arranged it was discovered that the stored furniture she was coming to view was reserved and the visit had to be cancelled.

80. The claimant did not and could not identify in his witness statement or the documents before the Tribunal where Mr Roberts had told him he was incompetent and these matters were the claimant's mess to sort out. Nor has the claimant provided an account in his witness statement or in oral evidence of a conversation (approximate date and method - in person - where / telephone) during which Mr Roberts may have said these things to him. Mr Roberts denies so doing.

81. Mindful the claimant is not represented, taking his case at its highest, we have considered the email exchanges about Lady Bathurst's visit. There is no mention of Mr Roberts saying the claimant was incompetent. Likewise any reference to the claimant having a mess to sort out.

82. In the claimant's December 2021 grievance, which contain several complaints about Mr Roberts, and which refers to events at this time, he does not mention that Mr Roberts told him he was incompetent and it was his mess to sort out. When the claimant was interviewed by Ms Annis on 25 April 2022 about the October 2021 meeting the claimant does not mention that Mr Roberts used these words. Given that these accounts by the claimant are more recent to the October 2021 conversation (being only a few weeks afterward), and no mention is made of Mr Roberts telling the claimant he was incompetent and it was his mess, we find that Mr Roberts did not say this. Mr Roberts accepts he had a conversation with the claimant at this time due to the need to cancel the visit. We find that the claimant and Mr Roberts discussed the need to cancel the visit but no suggestion was made by Mr Roberts that the claimant was incompetent or that it was his mess.

December 2021 grievance

83. On 7 December 2021 the claimant raised a grievance against colleagues. We have seen a copy of that grievance. In it the claimant alleges that he has been subjected to harassment and bullying. In his findings Mr Cook states that neither in the grievance document nor in the investigation documents did the claimant allege that the events about which he complains were motivated or happened because of his mental or physical conditions. We agree. Having reviewed these documents, we find that the references in these documents about the claimant's mental health speak to descriptions by the claimant as to the impact of the events he describes on his mental health.

Separation of claimant and Mr Roberts

84. The claimant alleges that the respondent failed to separate him and Mr Roberts despite the Claimant putting in a bullying and harassment complaint against Mr John Roberts in December 2021. He does not make this request in his grievance complaint. The claimant accepted he did not ask to be separated from Mr Roberts but seems to be suggesting that the respondent should have actioned a separation in any event by reason of the claimant submitting the grievance. The claimant does not identify in this complaint who should have actioned a separation. At the hearing he suggested that this was the responsibility of AC Savage. As the claimant did not identify AC Savage until midway through this hearing, the respondent has not called AC Savage to give evidence.

85. We are mindful that, at the time when the claimant says the separation should have been actioned (December 2021), no findings had been made against Mr Roberts. The claimant does not ask to be removed from Mr Roberts' line management; however, the respondent actioned this in any event, taking appropriate measures by replacing Mr Roberts with Mrs Woffinden as the claimant's line manager. We find that in this regard the respondent did separate the claimant and Mr Roberts in December 2021.

86. Furthermore, the advice and the claimant's wish at that time was for the claimant to return to his role on a phased return to work and the respondent was aware that the claimant wanted to stay in the same group in the same job and the OH advice was he was better in the same role. Therefore given operational requirements, the fact no allegations had been upheld in December 2021 (it was the start of the grievance process), the claimant's wish and OH advice that he should remain in the same role and the fact he had not requested physical separation, we find that the claimant's allegation before the Tribunal he should have been separated is misconceived.

87. We agree with Mr Cook's assessment that *"there was a delicate balance to strike."* We find that the measure of removing Mr Roberts' line management of the claimant was put in place to minimise their interaction and that it was not possible to physically separate them as they worked in the same vicinity and the claimant wanted to continue working in that role.

<u>2022</u>

Risk

88. The claimant alleges that Mr Roberts informed staff he was a risk to them on or around 3 February 2022. He does not include any narrative in his witness statement to explain where / how he had heard Mr Roberts say this. Mr Roberts denies saying that the claimant was a risk. At the hearing the claimant accepted he had not heard Mr Roberts say this, telling the Tribunal he was *"informed",* but could not tell us who had informed him, when they had done so and where this third party had heard Mr Roberts say this. Given the complete lack of specificity and evidence to support this allegation, we find it did not happen.

First ET claim

89. On 10 February 2022 the claimant issued proceedings in the Employment Tribunal with complaints of disability discrimination.

1 July 2022 meeting: Mr Roberts and Ms Annis

90. The claimant brings 2 factual complaints about comments he says Mr Roberts made at this meeting. We have notes of this meeting, which formed part of the investigation into the claimant's December 2021 grievance. Mr Roberts accepts that the written record of the meeting is accurate.

91. First, the claimant alleges that Mr Roberts' questioned his ability to manage a Team of "friends". We have considered notes of that meeting. Mr Roberts tells Ms Annis that the claimant "*had a very good relationship with Mark Lockyear and most of the Sennelager team but had acted as more of a friend than a manager, giving an afternoon off for good work which is not meant to happen"*. At the hearing the claimant took exception to the comment that he gave members of his team the afternoon off for good behaviour, denying he did so. Whether or not he did so is not a matter for the Tribunal. Mr Roberts told us that what he meant by this comment was that as a manager *"it is not your role to be everyone's friend as occasionally you need to make difficult decisions".*

92. There is no evidence before us, and the claimant has not provided any explanation, as to why he considers the comments were motivated by his physical or mental conditions. The comments were made in the context of a lengthy discussion Mr Roberts had with Ms Annis, as part of her investigation into the claimant's grievance complaints against Mr Roberts. Indeed, the comments must be read in the context of the wider conversation, and mindful that Mr Roberts was responding to serious allegations the claimant had made against him in the December 2021 grievance. The comment is made in the context of Mr Roberts explaining the removal of the Sennelager team from the claimant's management, Mr Roberts' opinion of the claimant's feelings about this and the need to clearly define the authority between the claimant and Mrs Hickman.

93. For these reasons, we find that Mr Roberts did not question the claimant's ability. We find that the claimant has reviewed the notes of this meeting, which were disclosed with him, and extracted a comment out of context of the investigation meeting Mr Roberts. When the comment is read in context, and taking account of the fact that there is no other evidence before us that Mr Roberts commented on or had concerns about the claimant's management style, we find that Mr Roberts was giving his opinion that the claimant had an informal management style.

94. Second, the claimant alleges Mr Roberts' comment that the claimant had *"days when he was very happy and days when he was not."* shows that Mr Roberts viewed the claimant's mental health disability as *"a problem"*. We agree that Mr Roberts did tell Mrs Annis that the claimant has *"days when he was very happy and days when he was not."* He did so in the context of an investigation and the full statement made by Mr Roberts (rather than the part of the statement extracted by the claimant)

"JR described JE as having days when he was very happy and days

when he was not. JR attributed this to feelings of frustration as JE's job was not that for which had applied."

95. Indeed, at the hearing the claimant told us he was happy to accept the comment was made about the issue he was having with Ms Hickman and not with his mental health, but did not formally withdraw this factual allegation.

96. We must read these words in the full context of the statement made to Ms Annis. In doing so, we find that Mr Roberts was commenting that the claimant's personal circumstances and the issue raised by Mrs Hickman in expressing his opinion that the claimant had days when he was happy and days when he was not. There is not evidence that this is a comment about the claimant's PTSD, anxiety, paranoia and depression.

Polo shirt

97. The claimant alleges that on 1 July 2022 Mr Roberts, via Mrs Woffinden, ordered him to wear the uniform of a DIO Labourer. At the hearing he told us the uniform was a branded polo shirt. The claimant also told us that he did not hear the alleged instruction but he was told this by Stuart Smith. Mr Smith has not given evidence. Mrs Woffinden told us she does not recall attending the meeting on 1 July nor any instruction from Mr Roberts, who she told us disagreed with her suggestion that staff should wear a uniform.

98. The claimant's evidence is also inconsistent. Initially he said that Mrs Woffinden handed him the shirt. When Ms Williams suggested it was not Mrs Woffinden the claimant told us Mrs Woffinden *"passed it to Mr Smith who then threw it at me."* When Ms Williams pointed out the inconsistency, suggesting the claimant had changed the account in his witness statement, the claimant replied: *"Not really, I just missed out the middle man, it was not him giving it to me."* The claimant's recollections are simply not credible; he did not hear any direction from Mr Roberts and he has changed his recollection of who passed (or threw) him the shirt.

99. For these reasons we prefer Mrs Woffinden's explanation that she made a decision to introduce branded attire *"to deliver a professional image, improve visibility of DIO ESG, remove barriers to equality across teams, assure families and the general public regarding DIO ESG employees, ensuring no confusion between people and companies operating on the estate, as well as ensuring that our staff were protected in the environment that they worked in"* applied to the whole team and was explained to them collegiately. None of these reasons were challenged by the claimant. Furthermore, this decision was not until October 2022 which makes the claimant's recollection even less feasible in our judgement.

June 2022 OH report

100. The claimant alleges that on 27 July 2022 Mrs Woffinden leaked details of the claimant's June 2022 OH report to Mr Roberts without the claimant's consent. He bases this allegation on references in his medical records that a welfare call was made by one of his managers, something Mr Roberts admits doing as he was aware that the claimant had been off sick.

101. We find that Mrs Woffinden was in an untenable position due to conflicting advice in the December 2021 OH report, namely that the clinician's assessment *"Mr Eyles is temporarily unfit for work. However Mr Eyles reports that work keeps him focused and being absent from work would likely cause a further decline in his symptoms".*

102. Faced with this contradictory advice Mrs Woffinden told us she was trying to do what was best for the claimant, mindful that he had expressed he wanted to return to work, contrary to an OH assessment he was unfit to do so at that time, and needed further clarification. She told us she was mindful that it was Mr Roberts who bore the risk (up the chain of command) if the claimant did return to work against OH advice so she sought:

*"…..personal support from Mr Roberts [her] line manager, as there were multiple elements to Mr Eyles case, which impacted to my workload and me personally and delays in DBS appointing a requested case worker to support me…..*I wanted to ensure he was aware of potential risks and issues with my work load and whole team and agreed courses of action enabling Mr Eyles to continue working which included minimising and accompanied interaction with Mr Eyles in response to the OH report discrepancies."

103. There is no evidence before the Tribunal that the whole report was shared with Mr Roberts. We find it was not. Mrs Woffinden shared key aspects of the report for the reasons she states (which were not challenged by the claimant). She told us she was cautious in what she shared and she did so as a supportive measure for the claimant to try to facilitate his return to work against OH advice he was unfit to do so. Indeed, the claimant accepted that Mr Cook approached him to see if Mrs Woffinden could have a conversation with Mr Roberts (who was her line manager). We find Mrs Woffinden's reasons for sharing some information were as she has stated.

Decision not to extend the claimant's 3 year tour

104. The respondent accepts that on 5 September 2022 Mrs Woffinden emailed the claimant to inform him that his tour would not be extended for an extra two years, in response to his request dated 13 May 2022. We have seen the email; the reason for the claimant's tour not been extended is clearly communicated to him as:

"ESG has actively during your tour been reviewing its structure in response to changes in Strategy for delivering accommodation overseas and our portfolio of assets; subsequently this has resulted in posts not continuing beyond advertised tour lengths. In order to ensure that ESG has an appropriate structure in place in the UK and our overseas locations to deliver our services and support our families has necessitated liaising with other departments and TLB's to agree a cohesive and enduring structure. The new structure will be communicated in three weeks. I will confirm to DBS that your tour is to remain at the normal three years as per policy and your posting letter and request you be given Priority Mover status."

105. Parties agreed that policy allowed a 2 year extension to an initial 3 year tour; the claimant accepted extension was not guaranteed.

106. Furthermore, when the claimant complained to AC Savage about the decision not to extend his tour, suggesting this was due to his bringing his December 2021 grievance (which Mr Cook concluded was not connected to his disabilities), he did not say the reason for not extending had anything to do with his disabilities.

107. On 6 September 2022 AC Savage emailed the claimant addressing this concern, telling him:

"The proposed disestablishment of your post is timed to coincide with the planned end of your tour, meaning that you will be able to complete your overseas tour as planned when you were assigned to your role. Any tour extension would only be granted where there is a specific business need, and in this case none exists."

108. We have also seen the communications from Mrs Woffinden to AC Savage which evidences he approved a number of staffing changes, including the decision not to extend the claimant's tour. We find that the reason the claimant's tour was not extended is as stated in Mrs Woffinden's email to AC Savage, that following the removal of the Sennelager team, the separate role of DAS manager was no longer required. Indeed, in an email dated 27 May 2022 Mr Roberts had already notified the claimant that DIO ESG were reviewing their ways of working; the subsequent decision not to extend the tour aligns with this review and Mrs Woffinden's decision that the "DAS Manager role was to be disestablished in light of the duty to use tax payers money prudently to ensure effective use of resources. Mrs Stone corroborates this was the reason, telling us that the claimant's extension request was part of a wider review of staffing within the Facilities Management Area.

109. There is absolutely no evidence that the decision to end the tour was in any way linked with the grievance. The end of the tour rose from operational restructuring and the decision of a senior officer, AC Savage (who was not subject to the December 2021 grievance). Further, there is no evidence the decision was linked to or motivated by the claimant's physical or mental conditions.

7 October 2022 visit to stores

110. It is accepted that on 7 October 2022 Mrs Stone and Mr Roberts visited the Claimant in the stores. The claimant accepts the reason for the visit was to inspect an issue with the stores roof. We find it was neither Mrs Stone's nor Mr Roberts' intention to visit the claimant, however as they were leaving they all crossed paths. The claimant accepted there was no agreement in place preventing Mr Roberts and the claimant being together and no requirement at that time for the claimant to receive advance notice if Mr Roberts was coming to the stores.

111. Parties agree that Mr Roberts came into the claimant's office with Mrs Stone, mentioned the end of the claimant's tour and his appeal of this decision not to extend and attempted to shake the claimant's hand and the claimant refused, distressed by the offer so Mr Roberts left. In explaining why he sought to shake the claimant's hand, Mr Roberts told us:

"The way I saw it, the grievance had been heard and that was the end of it and I still had to work with James while he was in SHAPE and had to work together. That [shake hands] is what you do."

112. There is no evidence before us to suggest that this interaction was anything other than well-meaning on the part of Mr Roberts. However, given some of the claims of bullying and harassment had recently been upheld against Mr Roberts (September 2022) and Mr Roberts told us that he was aware the claimant's suicide was October (even though the anniversary date *"was not on his radar"*) we find it was ill-intended and clumsy of Mr Roberts to approach the claimant in this way. Indeed, the claimant told us: *"would you want to shake hands the hand of an abuser"* and suggested that Mr Roberts was doing so to absolve his conscience. While the claimant's language is strong, it is not disputed by the respondent that the claimant became upset by this interaction; Mrs Stone and Mr Roberts both recall that he did. However, Mr Cook's assessment during the grievance process, and our finding, is that the December 2021 allegations that were upheld were not motivated by the claimant's physical or mental conditions; they centred on the incident with Mrs Hickman (and use of the word fraudulent) and comments on the football shirt the claimant was wearing at SHAPEFEST. Furthermore, the claimant did not suggest to Mr Roberts that absolution may have been his motivation. There was no evidence to support that the visit to the stores by Mr Roberts was motivated in any way by his knowledge of the claimant's physical or mental disability.

11 October 2022 visit to stores

113. It is accepted that on 11 October 2022 Mrs Woffinden and Mr Roberts visited the Claimant in the stores. They told us that the reason for the visit was to do a welfare check on the claimant as Mrs Woffinden had not heard from him that morning nor had she seen him on skype so was concerned about him and she was also aware that a task needed completing; this reason was not challenged by the claimant. Mrs Woffinden told us that Mr Roberts asked to accompany her; indeed, in his evidence to the Tribunal Mr Roberts told us that he suggested he accompany her. He also told us that when they came across the claimant he shouted *"safe space"* repeatedly. Mrs Woffinden told us that the claimant asked Mr Roberts to leave but could not recall him using the words "safe space". In an email to Mr Bowden later that day the claimant recounts the interaction, stating that he asked Mr Roberts to leave about 10 times. Given this contemporaneous email accords with Mrs Woffinden's evidence, we find that the claimant did not shout the words safe space but asked Mr Roberts to leave. Mr Roberts told us he did not say anything to the claimant. Mrs Woffinden's recalls the claimant asking Mr Roberts to leave andMr Roberts asking for the reason and the claimant continuing to *"raise his voice demanding Mr Roberts leave which he did."* As an observer who was not party to this interaction we prefer Mrs Woffinden's recollection that the claimant repeatedly asked Mr Roberts to leave, raising his voice, Mr Roberts asking why he needed to do so and also raising his voice. Mrs Woffinden described the tone of voice of both men matching that of the other.

114. The claimant accepted that there was no agreement in place at that time requiring prior notice of Mr Roberts' or anyone's attendance in the area of the

stores and office. In light of the interaction between Mr Roberts and the claimant on 7 October (about which we find Mrs Woffinden was not aware, as she was on annual leave returning on 10 October) and the recent outcome of the grievance process, we find Mr Roberts should have known the reason he was being asked to leave by the claimant. We find that given the interaction the previous week it was unnecessary for Mr Roberts to suggest accompanying Mrs Woffinden to check on the claimant and his suggestion he did so unwise. For the same reasons we find that it was unnecessary to Mr Roberts to ask why he was being asked to leave, and he should have known that to push the claimant on this point, by asking the question repeatedly, would cause him distress.

115. While we find Mr Roberts actions unwise and unhelpful, there is no evidence that he was motivated to attend with Mrs Woffinden or ask the question by his knowledge of the claimant's physical or mental conditions. While the question did cause the claimant mental anguish, there is no evidence it was asked because Mr Roberts knew about the claimant's depression and anxiety.

Rejection for an interview for DIO ESH Housing Manager post

116. It is accepted that in November 2022, the respondent rejected the claimant's application for the role of DIO ESH Housing Manager and that he was not invited to interview. The respondents say this is because he did not meet the sifting criteria to progress to interview. The claimant says he did meet the criteria and he was not progressed due to Alison Wood's knowledge that he was the sole incumbent DAS manager. To support this assertion, the claimant referred Mrs Wood to a meeting with Ms Annis as part of the December 2021 grievance investigation. It is agreed that Mrs Wood attended that meeting as support for Mrs Colquhoun. The claimant asserts that by attending a meeting where the discussion and documents identified him as the only DAS manager, Mrs Wood had a conflict of interest which led her to reject his application.

117. Mrs Wood accepted that the claimant's role of DAS manager was on his application and that this role was referenced in the meeting she attended to support Mrs Colquhoun. However, she denies that she made this link, telling us she was an independent sifter with no knowledge about DIO in Belgium and her focus in the sift was to look at competencies by reference to the applicant's evidence to determine if they have met the mark to pass the sift and while she may have read the reference to DAS manager in the claimant's application, it *"did not come into my mind that there was an association with the person in the application as I was there as a support to Melanie….when it came to the interview I was looking at the competence and whether the evidence is strong enough to go to interview."* It is agreed that the claimant's name was not visible on his application when Mrs Wood reviewed it.

118. There is no evidence that Mrs Wood's independence in assessing candidates was compromised (in October 2022) by her supporting Mrs Colquhoun (in July 2022). Even if Mrs Wood had drawn the link (which is based on the claimant's presumption rather than any supporting evidence), there is no evidence that would have influenced Mrs Wood's assessment of his application. We find Mrs Wood was focused on sifting 20 applications,

concluding that the claimant did not present sufficient evidence to support the clear assessment framework and therefore did not meet the minimum criteria to progress to interview.

119. In any event there was a second sifter, Mrs Hinton, who also scored the applications, then both scores were considered by the chair to enable any significant differences in scoring outcomes to be reviewed and considered. The claimant has not alleged any conflict in respect of Mrs Hilton. It is simply not feasible that they colluded to stop the claimant from progressing to interview; the allegation is based on a misinterpretation of events for which there is no supporting evidence. Even if there was a conflict of interest with Mrs Wood (for which there is no evidence to support she drew the link between the reference at the meeting with Ms Annis and the claimant's CV), Mrs Hinton was an entirely independent moderator of Mrs Wood's marking to check any discrepancies in marking.

November 2022 sickness absence

120. The claimant makes 2 complaints about his November 2022 sickness absence.

121. First, he alleges that in November 2022 Mrs Woffinden threatened him in respect of his sickness absence. At the hearing he clarified this allegation, telling us that the threat was the invitation to the continuous absence review meeting; this is the letter dated 25 November 2022 sent to the claimant by Mrs Woffinden (page 946 of the hearing file); he relies on the fact it was sent and its content.

122. We have reviewed the respondent's policy on continuous absence; we find that in sending the letter Mrs Woffinden was following the respondent's direction in that letter; she used the respondent's standard letter (version 4.0, September 2022). We have considered the wording of the letter; it explains the purpose and gives the details of the proposed meeting, aligning with the respondent's policy of sickness absence. The letter also states:

"One of the purposes of the meeting is to enable me to consider whether to progress formal action. I will consider whether this is appropriate. I must remind you that if I do this and you are not able to return to work within a reasonable timeframe, your employment with the Department could be affected."

123. The wording of the letter puts the claimant on notice of potential formal action, depending on the discussion which takes place at the meeting. In this context, we find that the wording is not communicated as a threat; it aligns with the respondent's policy and applying the Tribunal's expertise we make the observation that it is usual and legitimate for organisations to understand the reasons for and causes of absence and, if warranted (once this information has been discussed with the employee), take formal action. Where this consideration is identified in the process (for example as part of an employer's policy), it is good practice for an employer to let the employee know this is a possible outcome. We find the wording used by the respondent is not a threat, but good practice. The respondent's policy for a continuous

formal review meeting reflects this and aligns with the wording of the letter: It states:

"Following a Formal Continuous Absence Review Meeting, the manager should decide the next steps.
…..
c. In some circumstances, taking account of all the information available, it is appropriate for managers to use their discretion and take no further action after a Formal Continuous Absence Review Meeting. The DBS Casework Service can provide further advice on individual cases.
d. If the continuous absence can no longer be supported, the case should progress to considering dismissal/downgrading. Caseworker advice must be sought if this option is considered. Based upon OH advice, consider whether Ill Health Retirement or a Fit for Work Plan could be considered."

124. Mrs Woffinden told us that *"it was important to have a review meeting to discuss how Mr Eyles could be supported during his sickness absence and subsequent return to work".* We agree; no decisions had been made regarding the outcome of the meeting, as is made clear by the wording in the letter. The letter was sent due to the length of the claimant's sickness absence as a result of his mental conditions.

125. Second, the claimant alleges that on 26 November 2022 Mrs Woffinden tried to arrange a Continuous Absence Review Meeting as a result of the Claimant being sick from 18 October – 27 November 2023. The claimant could not direct us to any letter from Mrs Woffinden or any manager, or conversation on 26 November 2022. The respondent admits thatby Mrs Woffinden's letter dated 25 November 2022 the respondent invited the claimant to a contiuous absence review meeting meeting. . We find that she did so as she was following policy; the letter was triggered by the length of the claimant's absence.

<u>2023</u>

January 2023 review of claimant's sickness absence

126. The respondent accepts that on 10 January 2023 Ms Woffinden arranged a Formal Absence Review Meeting in relation to the claimant's previous year's sickness absence. We have seen that letter; it clearly sets out the purpose of the meeting and possible outcomes. Mrs Woffinden sent this following policy and advice from HR (Nick Thompson) who told her in an email dated 10 January 2023 *"in line with the Supporting Attendance policy you should now invite James to a Formal Attendance Review Meeting (FARM) as he has exceeded his Absence Review Point (9 working days in a 12-month rolling period)."*

127. The claimant says that the respondent had a practice requiring him to work in an office. At the hearing the claimant clarified that the basis of this claim was that in January 2023 he moved from basing himself mostly in the stores, which he admitted was where he worked alongside his team for the majority of his employment to that date, to the office while the stores were being renovated. The claimant told us that the disadvantage to him was that

Mr Roberts also worked in this office area; given that some of the allegations against Mr Roberts had been upheld by Mr Cook in the internal grievance findings, the claimant told us he did not want to work in the same vicinity as Mr Roberts.

128. We find that the respondent did not have a practice of requiring the claimant to work in an office. By his own admission, relocating to the office from the stores was an interim measure for the duration of the stores renovation. The claimant returned to work from sick leave on 3 January 2023 and the works started on 9 January 2023 and were ongoing for several weeks.

129. It is for this period the claimant says he should have been allowed to work from home. Prior to his return, the respondent agreed that he could work from home on 4 and 5 January 2023. Mrs Woffinden also agreed to let the claimant work from home on 10 January 2023 as he was not feeling well, but expressed a reasonable view that if he was not feeling well he should not be working (and therefore it should be a sick day) and that to work from home on an ongoing basis would require the claimant to make an flexible working request, which the claimant admits he did not do during his tenure at SHAPE.

130. The claimant accepted that Mr Roberts was on sick leave for the entirety of his return to work until he went on deployment leave. Therefore, we find there was no disadvantage to the claimant working in the office as the reason he wanted an adjustment to work from home at that time was not a reality; he would not cross paths with Mr Roberts in the office area. In any event, the respondent agreed that from mid-February (when the claimant was notified that he was not medically supportable for the Sennelager job) he could take redeployment leave working from home until the end of his tour.

SO2 post in Sennelager as a Field Contract Repair Department Manager

131. The respondent accepts that in March 2023 the respondent withdrew the job offer for the role of Field Contract Repair Department Manager (based in Sennelager) which it had made on 7 December 2022. Mr Kelly-Smith told us that the offer was withdrawn following medical advice that the claimant's alcohol misuse disorder (specifically his admission that he considered the condition under control as he was limiting his drinking to 2 drinks a day) and self-harm could not be locally supported at the base in Germany. On 22 February 2023 the claimant received an email from the resourcing team telling him that he did *"not meet the medical supportability requirements required for the role."* The claimant appealed this outcome. On 28 February 2023 the claimant was notified by the appeal panel they had upheld the decision he was not medically supportable. He shared this outcome with Mr Kelly-Smith.

132. Mr Kelly-Smith told us, and the claimant accepts, that ultimately it was his decision to withdraw the job offer. He did so on having first discussed the appeal outcome with the assessing doctor, who told him that the claimant's medical issues were *"high risk".* At the hearing Mr Kelly-Smith explained to us that he took into account of the following: the medical reports; the fact the claimant was continuing to drink; that this is often linked to mental health conditions; his knowledge of the claimant's mental health conditions the fact that the Sennelager base was isolated, and was a very challenging work

environment; and there were not the support facilities available in Germany that had been available to the claimant in Belgium and were available in England. He also explained that there have been recent suicides by staff working on this base, the findings for which related to alcohol use and isolation. Mr Kelly-Smith explained that in all these circumstances he concluded that it was not in the claimant's interest to work in this environment. Furthermore, it was not a risk the respondent could take given the claimant's on-going alcohol use, suicide attempt and disclosed mental health conditions

133. At the hearing the claimant challenged the medical advice that his alcohol condition could not be managed locally. This is not a matter for the Tribunal. The complaint brought by the claimant is that he was discriminated against on the basis of his physical and mental disabilities; for the purposes of this claim he does not rely on alcohol misuse disorder as a physical or mental disability.

2022/2023 PAR

134. The claimant alleges that, on 27 April 2023, Mr Roberts and Mrs Woffinden submitted a PAR which was defamatory, dishonest, discriminatory and prejudiced because it alluded to the Claimant's "periods of absence" and "inability to achieve performance goals", and gave the Claimant an overall rating of "partially met". The respondent accepts that the claimant's PAR had an overall rating of *"partially met"*. We have considered the PAR document; it does record periods of his absence. It does allude to the fact that the claimant has "*an inability to achieve performance goals".* What it says is:

"He has also had ongoing issues which have resulted in periods of absence which have meant he has been unable to fully demonstrate progress or full achievement of his performance goals."

135. Repeatedly at the hearing the claimant told us he did not have any objectives for his PAR and for this reason he did not complete the employee part of the PAR document, despite him receiving several notifications requesting that he did so. The claimant confirmed he was aware that failure to complete the employee section would lead to an automatic outcome of "not met". We disagree; it would appear there are at least 4 objectives which are clear on the face on the PAR document (page 1021). Therefore, we find that there was no excuse for the claimant not completing his part of the PAR.

136. As the line manager reviewing his PAR Mrs Woffinden concluded the claimant was not meeting his objectives (not least as, by his own admission, he had not submitted evidence as required by the process). Therefore, initially she contemplated a grade of *"not met"* based on the claimant's lack of engagement on the PAR system. She discussed her thoughts with Mrs Stone, who suggested that Mrs Woffinden bypass the system in this regard due to the fact the claimant had not engaged with the process and had had recent periods of sick leave.

137. The claimant focused on Mrs Woffinden's use of the term fraudulent. He has not taken account of the context in which Mrs Woffinden used this word. Her concern was that the system required her to confirm that she had discussed the contents of the PAR with the claimant. We find that she was unable to do so due to a combination of his lack of his engagement (the

claimant told us he *"ignored"* the automated reminders as he did not have any objectives) and sick leave. Notwithstanding our finding that there were objectives, had an employee thought there were not, that employee would be reasonably expected to raise this concern with a line manager; he did not do so. We find she used the term in the context of not wanting to confirm she had spoken with the claimant when she had been unable to do so. We find the reason Mrs Woffinden had used the term fraudulent was due to the claimant's lack of engagement with the process and Mrs Stone's suggestion she complete the form in any event.

138. Mrs Woffinden took on board Mrs Stone's suggestion that Mrs Woffinden used some of her personal knowledge about the claimant's work to raise not met (due to the claimant not providing evidence of his work) to partially met. In this regard we find Mrs Woffinden acted more favourably towards the claimant and in his interests rather than recording not met which is what the system defaulted to due to his failure to complete the employee part of the form.

139. The claimant alleges the PAR outcome of *"partially met"* was defamatory (damaging reputation by writing bad things that are not true). We find that the PAR was not defamatory: it is factually correct that the claimant had periods of absence; it is factually correct that he did not submit any evidence in support of his performance to show he met his objectives (which we have found were set). In this regard the respondent could have graded the PAR *"not met".* However, notwithstanding the claimant's failure to submit evidence in support of his PAR, Mrs Woffinden raised the outcome to partially met.

140. The claimant alleges the PAR outcome of *"partially met"* was dishonest in that it was not transparent and did not show the whole picture. It is factually correct that the claimant had periods of sickness absence. It is also factually correct that on the face of the PAR document he did not achieve his performance goals.

141. The claimant alleges the PAR outcome of *"partially met"* was discriminatory and prejudiced in that (he told us at the hearing) future line managers would see the contents of the PAR. It did not prejudice him; he had had periods of sick leave and by raising not met to partially met Mrs Woffinden acted in a way favourable to the claimant rather than prejudicing him. In any event he did secure a fixed term contract with the respondent, returning to England so there was no discrimination or prejudice arising as a result of the wording.

Good luck card

142. The respondent accepts that when the claimant left SHAPE on 16 July 2023 he was not presented with a Good Luck card or presentation. The claimant did not challenge the respondent's evidence that not everyone had a presentation or received a good luck card when they left . Indeed, Mrs Colquhoun told us she did not get a presentation or card when she left her post in July 2024.

Period of ill health

143. The OH reports evidence that the claimant did experience periods of absence through ill health due to his mental conditions. There is no evidence that his physical conditions resulted in period of absence. Indeed, the claimant was candid with the Tribunal in explaining the symptoms of his physical condition and how he managed these in the workplace.

Medical supportability

144. Mr Kelly-Smith told us that in concluding that the claimant's job offer should be retracted as he was not medically supportable he took account of the claimant's mental conditions and their interaction with his alcohol use.

Capability

145. The claimant claims he was considered less capable by his managers due to his physical and mental conditions, telling us that his physical condition could result in embarrassing situations and his mental conditions could lead to peaks and toughs in his wellbeing. The claimant told us he heard things based on reports from other individuals and his own assessment of the things they told him. However, he could not be specific what those things were, who said them or when they were said nor could he direct us to any documentary evidence to support this claim. We find he was not considered less capable by his managers and colleagues due to his physical or mental conditions.

Clothing

146. The claimant told us that in consequence of his physical conditions he needed to wear less formal clothing. At the hearing he accepted he did not expressly tell Mr Roberts that his physical conditions resulted in a requirement for him to dress casually in the workplace (wearing T-shirts, shorts and tracksuit bottoms), but had assumed that Mr Roberts would reach this conclusion as they had spoken about having similar conditions at their initial meeting in March 2020. The claimant also accepted that he did not tell Mrs Woffinden about this requirement in October 2022 when he was asked to wear standard clothing, nor at any point during his employment.

147. For completeness, it is noted that on day 6 of the hearing the claimant withdrew his allegation that Mr Roberts dismissed in email correspondence the claimant's advice that finances needed to be investigated following an unauthorised approval of a purchase by Mrs Hickman.

Relevant law

148. The law which applies to the complaints made by the claimant is set out below. Mindful the claimant is not represented, at the case management hearing on 9 August 2023 Employment Judge ("EJ") Warren explained to the claimant in plain language the legal basis for each complaint. This explanation was also recorded in the case management order sent to parties on 3 October 2023; these explanations are set out below.

<u>Jurisdiction – time limits</u>

149. Section 123 of the Equality Act 2010 provides:

(1) Subject to section 140B 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.
(2)Proceedings may not be brought in reliance on section 121(1) after the end of—
(a)the period of 6 months starting with the date of the act to which the proceedings relate, or
(b)such other period as the employment tribunal thinks just and equitable.
(3)For the purposes of this section—
(a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.
(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a)when P does an act inconsistent with doing it, or
(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

150. The ACAS early conciliation procedure covers discrimination claims. The primary time-limit is within 3 months of the discriminatory action. If the claim is late, the tribunal has a 'just and equitable' discretion under s123(1)(b) to extend time. *In Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96, the Court of Appeal held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts. There needs to be some kind of link or connection between the actions.

151. Ms Williams referred us to the case of *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132, noting that the Employment Tribunal may take into account its assessment of the merits of a claim when deciding whether to extend a limitation period on the 'just and equitable' basis. She also referred us to *Robertson v Bexley Community Centre* [2003] EWCA Civ 576, submitting that whilst the Tribunal's discretion to extend time in complaints of discrimination is a wide one, time limits are to be observed strictly and there is no presumption that time will be extended: the exercise of the discretion is still the exception rather than the rule.

Section 6 Equality Act 2010: definition of disability

152. Section 6 Equality Act 2010 provides:

(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.
(2)A reference to a disabled person is a reference to a person who has a disability.
(3)In relation to the protected characteristic of disability—

(a)a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
(b)a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
(4)This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—
(a)a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
(b)a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
(5)A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
(6)Schedule 1 (disability: supplementary provision) has effect.

153. The burden of proof provisions are contained in section 136 Equality Act 2010:

…….

(2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene that provision.

……

Section 136 Equality Act 2010: burden of proof in discrimination complaints

154. Section 136 prescribes two stages to the burden of proof: stage 1 (primary facts) and stage 2 (employer's explanation). At stage 1, the burden of proof is on the claimant *Ayodele v Citylink Ltd & Anor* [2017 EWCA Civ 1913. Stage 2 considers the employer's explanation. We must ask: has the employer proved on the balance of probabilities that the treatment was not for the proscribed reason? In a direct discrimination case, the employer only has to prove that the reason for the treatment was not the forbidden reason. There is no need for the employer to show that they acted fairly or reasonably.

155. The Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142 sets out guidelines on the burden of proof. Therefore, the process a Tribunal must follow is:

155.1. Establish if there are facts from which a Tribunal can determine that an unlawful act of discrimination has taken place;

155.2. If the Tribunal concludes that there are, the burden of proof shifts to the respondent to provide a non-discriminatory explanation for the conduct.

156. We note the guidance about applying the burden of proof in *Efobi v Royal Mail Group Ltd* [2021] IRLR 811 (SC), in particular:

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that … the*

respondent had committed an unlawful act of discrimination" (per Mummery LJ in *Madarassy* at para.56; endorsed in *Efobi* at para.46).

157. Ms Williams referred us to the case of *Madarassy v Nomura International plc* [2007] EWCA Civ 33 which held, inter alia, that a difference in protected characteristic and a difference in treatment is not sufficient to shift the burden of proof to the respondent. The claimant must show "something more" that a difference in protected characteristic (for example a person with disabilities and a person without those disabilities) and a difference in treatment (the promotion of the former and not the latter) is not sufficient.

Section 13 Equality Act 2010: direct discrimination

158. Section 13 Equality Act 2010 provides:

(1)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.
(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
(4)……..

159. Section 13 provides for a comparison by reference to circumstances in a direct discrimination complaint. The Tribunal must consider whether the employee was treated less favourably than they would have been treated if they did not have the protected characteristic. One way of testing whether or not the employer would have treated them better if they did not have the protected characteristic is to imagine a "hypothetical comparator". There is no actual comparator in this case; therefore, the test of hypothetical comparator is applied. The circumstances of a comparator must be the same as those of the claimant, or not materially different. The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison: *Hewage v Grampian Health Board* [2012] UKSC 37.

160. The important thing to note about comparators (whether actual or hypothetical) is that they are a means to an end. The crucial question in every direct discrimination case is: What is the reason why the claimant was treated as he was? Was it because of the protected characteristic? Or was it wholly for other reasons? It is often simpler to go straight to that question without getting bogged down in debates over who the correct hypothetical comparator should be: *Shamoon v Royal Ulster Constabulary* [2003] UKHL 11.

161. Ms Williams referred us to the case of *Nagarajan v London Regional Transport* [2000] 1 AC 501 noting that the Tribunal must consider was the reason for treatment the protected characteristic, considering the mental processes of the alleged discriminator, including any subconscious motivator. We note that the protected characteristic need not be the *only* reason for the less favourable treatment. It may not even be the main reason. Provided that the decision in question was significantly (that is, more than trivially)

influenced by the protected characteristic, the treatment will be because of that characteristic and discrimination would be made out.

162. EJ Waren explained that direct disability discrimination is where a person is treated badly because they are disabled. The motive in the mind of the person inflicting the bad treatment is that they are doing it because the Claimant is disabled. The Tribunal compares how the Claimant was treated to how another person who is not disabled would have been treated in the same circumstances.

Section 15 Equality Act 2010: discrimination arising from disability

163. Section 15 Equality Act 2010 provides:

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

164. We note the case of *Pnaiser v NHS Business Services Authority* [2016] IRLR 170 (EAT) and the "material influence" test again which we note applies by reference to the relevant "something arising in consequence of disability" rather than the protected characteristic itself, noting a test of "but for" causation does not apply.

165. In assessing any objective justification put forward by an employer and whether the relevant treatment must be a proportionate means of achieving a legitimate aim. We applied the guidance in *Homer v Chief Constable of Yorkshire Police* [2012] ICR 1287 (SC) (per Baroness Hale at para.22).

166. EJ Waren explained that discrimination arising from disability is where a particular state of affairs exists caused by the Claimant's disability and because of that state of affairs, something unfavourable is done to the Claimant. I gave the classic example; a person has a poor attendance record caused by their disability and because of that poor attendance record, they are disciplined or dismissed.

Section 20 Equality Act 2010: duty to make adjustments

167. Section 20 Equality Act 2010 provides:

(1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2)The duty comprises the following three requirements.
(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.

(4)The second requirement is a requirement, where 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.
(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
(9)In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—
(a)removing the physical feature in question,
(b)altering it, or
(c)providing a reasonable means of avoiding it.
(10)A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—
(a)a feature arising from the design or construction of a building,
(b)a feature of an approach to, exit from or access to a building,
(c)a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
(d)any other physical element or quality.
(11)A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
(12)A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
(13)The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

168. In the case of *Mr J Hilaire v Luton Borough Council* [2022] The Court of Appeal held that, however widely and purposively the concept of a PCP was to be interpreted, it did not apply to every act of unfair treatment of a particular employee. All three words ("provision", "criterion" and "practice") carried the connotation of a state of affairs indicating how a similar case would be treated if it occurred again; although a one-off decision or act could be a practice, it was not necessarily one. A one-off act in respect of an individual employee is not capable of constituting a valid PCP. It must at least be possible to find on the evidence that the PCP identified would hypothetically be applied to others *Ishola v Transport for London* [2020] IRLR 368 (CA) at paragraphs 35-39.

169. It is necessary for the employer to have actual or constructive knowledge not only of the relevant disability, but of the relevant substantial disadvantage as well: *Wilcox v Birmingham CAB Services Ltd* (23.6.11,

UKEAT/0293/10/DM); *Secretary of State for Work and Pensions v Alam* [2010] IRLR 283 (EAT). the substantial disadvantage of "stress" is not something that it will generally be reasonable to have to make adjustments for, due to its wholly subjective nature (*Griffiths v Secretary of State for Work and Pensions* [2016] IRLR 216 (CA), per Elias LJ at para.68).

170. EJ Warren explained that failure to make reasonable adjustments is that the particular way of doing things, (referred to as the provision, criterion or practice or PCP) puts the disabled person at a disadvantage and there is an adjustment to that way of doing things that can reasonably be made in order to remove the disadvantage.

Section 26 Equality Act 2010: harassment

171. 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.
(2)A also harasses B if—
(a)A engages in unwanted conduct of a sexual nature, and
(b)the conduct has the purpose or effect referred to in subsection (1)(b).
(3)A also harasses B if—
(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b)the conduct has the purpose or effect referred to in subsection (1)(b), and
(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(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.
(5)The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

172. In considering assessing whether alleged conduct is "related" to the relevant protected characteristic on the facts (here disability) we are mindful of the guidance in *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495 *(EAT),* that there must:

"be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related

to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be" (per HHJ Auerbach at para.25).

173. In considering the words "intimidating, hostile, degrading, humiliating or offensive" a Tribunal must be sensitive to the hurt comments may cause but balance so as not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336. Where a claim for harassment is brought on the basis that the unwanted conduct had the *effect* of creating the relevant adverse environment, section 26 has been interpreted as creating a two-step test for determining whether conduct had such an effect; *Pemberton v Inwood* [2018] EWCA Civ 564. The steps are:

173.1. Did the claimant genuinely perceive the conduct as having that effect?
173.2. In all the circumstances, was that perception reasonable?

174. Ms Williams also referred us to the case of *Richmond Pharmacology v Dhaliwal* [2009] ICR 724 which sets out the requirements for an assessment of harassment, noting the Tribunal must address and make factual findings on each.

175. EJ Warren explained that harassment is where things are done or said connected in some way to disability that create a hostile, unpleasant working environment.

Section 27 Equality Act 2010: victimisation

176. Section 27 Equality Act 2010 provides:

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—
(a)B does a protected act, or
(b)A believes that B has done, or may do, a protected act.
(2)Each of the following is a protected act—
(a)bringing proceedings under this Act;
(b)giving evidence or information in connection with proceedings under this Act;
(c)doing any other thing for the purposes of or in connection with this Act;
(d)making an allegation (whether or not express) that A or another person has contravened this Act.
(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4)This section applies only where the person subjected to a detriment is an individual.

(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

177. A detrimental act will not constitute victimisation, if the reason for it was not the protected act itself, but some properly separable feature of it. There is no requirement that the circumstances be exceptional for such a case to arise: *Page v Lord Chancellor and anor* [2021] IRLR 377 (CA), per Underhill LJ at paras.55-56.

178. EJ Warren explained that victimisation is where the Claimant has complained to the employer about being subjected to discrimination, or given the employer to believe that the Claimant might make such a complaint or bring a claim to the Employment Tribunal and because of that complaint, the employer treats the Claimant badly. It follows that in a victimisation claim, the Claimant has to identify the complaint about discrimination, (the Protected Act) and each item of bad treatment which comes afterwards said to be because of that Protected Act.

Analysis and conclusion

Factual allegations which did not happen as alleged by the claimant or at all

179. We have found that the following factual events did not take place at all or as alleged by the claimant:

179.1. The allegation that Mr Roberts threatened the claimant with police action. We have found Mr Roberts did refer to police action but it was not a threat.

179.2. The allegation that Mrs Hickman dismissed the claimant's opinion that the flat-packed furniture should be assembled by the labourers because that would save tax payers' money and speed the process up. We have found that there is no evidence that the claimant told Mrs Hickman in April 2021 that the labourers should build the wardrobes to save money. Indeed, the Sennelager team was not removed from the claimant's management until May 2021. In April this matter fell within his management. We have found that there is no evidence that the claimant gave advice about the labourers building the wardrobes to save money in September 2021. The discussion at this time centred on a genuine concern raised by Mrs Hickman that the labourers were not insured to build the wardrobes, a concern raised following suggestions by third parties. The emails at this time evidence that the claimant disagreed and, following further third party advice Mrs Hickman accepted the claimant's view that the labourers were insured.

179.3. The allegation that it was Mr Roberts' decision to remove the Claimant's responsibility for the Sennelager team on 19 May 2021. We have found that Mr Roberts was only involved in the implementation of the decision.

179.4. The allegation that the decision to remove the Sennelager team from the claimant's management constituted a demotion. We have found it was not: while certain of the claimant's duties were diminished by a

commercial decision made higher up the chain of command, the claimant retained his job title, salary, some line management responsibilities, line manager and retained the same position within the chain of command.

179.5. The allegation that Mr Roberts and Mrs Stone restricted the Claimant to menial duties. We have found that, while overall the claimant retained his line management duties and some management responsibilities (neither of which constitute menial tasks however diminished) and the claimant's view that a restructuring decision which removes some of his team equates with a move to menial tasks, misconceived. Furthermore, we have found that Mrs Stone and Mr Roberts sought to find additional and interesting tasks for the claimant, who did not engage with this option.

179.6. The allegation that Mr Roberts and Mrs Colquhoun dismissed the claimant's health and safety concerns about the house in Ulm. We have found that Mrs Colquhoun actioned works to the fence about which the claimant was concerned, within the confines of a rental property, MOD budget and the local environment, and the claimant was informed of this prior to these proceedings. We have also found that Mr Roberts' input was a concern about the use of the term *"stranger danger"* in the context of never being able to completely guarantee against this, but that the email taking issue with this term did not dismiss the concern.

179.7. The allegation that on 8 October 2021 Mr Roberts belittled and scolded the by telling him that he was incompetent and that it was his mess to sort out. We have found that Mr Roberts did not use these words and there is no evidence he said anything that could be interpreted as such.

179.8. The allegation that Mr Roberts informed staff the claimant was a risk to them on or around 3 February 2022. The claimant admitted he did not hear Mr Roberts say this nor could he identify who did and the circumstances in which they did so. There is no documentary evidence to support this allegation. Accordingly, we have found Mr Roberts did not say this.

179.9. The allegation that Mr Roberts questioned the claimant's ability to manage a Team of "friends" in a discussion with Jane Annis on or around 1 July 2022. We have found that Mr Roberts expressed an opinion about the claimant's management style in his meeting with Ms Annis but did not comment on the claimant's ability as a manager in this meeting or at any other time in the documents before the Tribunal. The opinion was not a comment on the claimant's ability.

179.10. The allegation that Mr Roberts considered the claimant's disabilities a problem. We have found that while Mr Roberts did comment to Ms Annis in the meeting on 1 July 2022 that the claimant had *"days when he was very happy and days when he was not"* he did so in the context of explaining why the claimant appeared upset and stressed on occasion and put this down to the loss of his Sennelager team and personal circumstances. Mr Roberts did not express any view at this meeting that this was a problem.

179.11. The allegation Mr Roberts ordered the claimant to wear the uniform of a DIO Labourer (a polo shirt) via Mrs Woffinden on 1 July 2022 or at all. The claimant did not hear this comment and we have found the claimant's evidence inconsistent and there is no evidence that any direction was given in July; attire was rolled out to all staff but not until October 2022 at Mrs Woffinden's direction.

179.12. The allegation that Mrs Woffinden threatened the claimant about his sickness absence. We have found that the 25 November 2022 letter inviting the claimant to a formal continuous absence review meeting was not a threat. Mrs Woffinden was following policy using the standard letter which reflected the policy and standard practice.

179.13. We have found that the claimant's 2022-2023 PAR was not defamatory, dishonest, discriminatory nor prejudiced. The claimant did not contribute to this process despite objectives being apparent on his PAR documents. We have found this would usually have resulted in an outcome of *"not met"* but that, notwithstanding the lack of engagement from the claimant, Mrs Woffinden took it upon herself to add her personal knowledge of the claimant's work to the PAR document to enable an more favourable outcome for the claimant of *"partially met".* The PAR accurately records that the claimant had periods of absence. It does not record that he had an inability to meet his performance goals. The performance goals were not met as the claimant, by his own admission, did not respond to automated reminders to complete his PAR, submit any evidence against his goals, or the extent he did not consider there were goals set, request assistance from his manager to identify these on the system.

180. As they did not happen either at all or as alleged, they cannot, as a matter of fact, amount to complaints of discrimination in these proceedings and we do not need to consider these allegations further.

Time limits

181. The respondents submit that any events about which the claimant complains which are found to have taken place before 14 October 2021 in the first claim and 16 April 2023 in the second claim are out of time.

182. The events in the first claim (10.2.22) which predate 14 October 2021, and which we have found occurred as alleged are:

182.1. The decision to remove the Sennelager team (2 February 2021);
182.2. Pulling rank comment (12 April 2021);
182.3. Implementation of the decision to remove the Sennelager team (April 2021); and
182.4. Mr Roberts' comment *"I see you have your work clothes on"* (18 September 2021).

183. Ms Williams reminded the Tribunal that we must consider the reasons for and length of delay in the claimant commencing proceedings as well as the merits of the claim. She also noted we must consider the balance of prejudice

to the respondent's evidence of this delay, submitting that there is a particular prejudice to the respondent where the claimant's allegations are not supported by documentary evidence as recollections fade over time. As regards the second claim, Ms Williams noted that the claimant was aware of the process as he had already brought a claim so there was no excuse for the delay in bringing any allegations which are out of time in the second claim.

184. The claimant told us that the factual allegations he makes are part of a continuing state of affairs of bullying and on-going situation for which he says the respondent is responsible. He relies on the case of *Southern Cross Healthcare v Owolabi* UKEAT/0056/11/RN to link these events, telling us that during the period to which the allegations relate Mr Roberts was either his direct line manager or counter signatory and a common personality to the allegations which, therefore, do not stand in isolation

185. We have considered the time line. The first allegation of which the claimant had direct knowledge is dated 12 April 2021. Therefore, applying section 123 Equality Act 2010 the deadline for bringing this complaint was 11 July 2021. ACAS conciliation does not extend this deadline, as the claimant did not start conciliation in the first claim until January 2022.

186. In deciding whether the complaints constitute continuing acts or whether it is just and equitable to extend time we refer ourselves to the case of *Miller and ors v Ministry of Justice and ors and another case* EAT 0003/15,, noting that while the discretion to extend time is a wide one there is no presumption that time will be extended unless it cannot be justified and that the exercise of discretion is the exception rather than the rule. What factors are relevant to the exercise of the discretion, and how they should be balanced, are a matter for the Tribunal.

187. We are mindful that case law on this point allows us to take a wide range of matters into account when determining whether it is just and equitable on the facts to allow a claim to proceed out of time, taking account of all the circumstances of the case and the guidance in Hendricks v *Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA*. In this case, the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts'. Therefore, we direct ourselves that we must consider whether, on the evidence before us the claimant has a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs.

188. We conclude that, on the claimant's interpretation of his allegations, he does and this is evidenced by his considering a grievance in April 2021 and bringing a grievance in December 2021 about some of these complaints. This, coupled with the fact that, while it was not known to the respondent until December 2021, there is evidence before us that the claimant had PTSD and associated paranoia such that he links these events in his mind and, in our judgement, satisfies the test that it is just and equitable to extend time for these complaints. In reaching this conclusion we have considered any prejudice to the respondent. We agree with Ms Williams that there may be some prejudice to the respondent given the passage of time. However, we found the recollection of the respondent's witnesses clear, detailed and,

generally, consistent with each other, even where documentary evidence was lacking. We conclude that the balance of prejudice to the claimant of not extending time is greater in all the circumstances.

189. We have also considered the potential merits of the claims (from a high level before applying the legal tests under the Equality Act 2010) and are mindful that some of the complaints were upheld by the Mr Cook as part of the respondent's findings in response to the claimant's December 2021 grievance. Given that, in September 2022, the respondent made some findings of harassment and bullying and that some of the factual allegations are common to these claims we consider it just and equitable to extend time to allow the Employment Tribunal to consider whether these allegations are related to the claimant's disabilities.

190. We note Ms William's submission that the claimant knew the process when he brought the second claim and agree. However, we for the same reasons, consider it just and equitable to extend time for any of the complaints in the second claim which predate 16 April 2023.

Disability

191. The Respondent accepts that Mr Eyles was disabled by reason of PTSD, depression, anxiety and paranoia (the "mental impairments"). The Respondents accept that they had knowledge of the Claimant's PTSD, Depression, Anxiety and Paranoia from 3 December 2021. The claimant relies on allegations predating 3 December 2021 which he says were related to his mental health conditions.

192. We have found that the respondent's managers did not know that the claimant had the conditions of PTSD, depression, anxiety and paranoia within the definition of section 6 of the Equality Act 2010 (that they were conditions that were long term, lasting more than 12 months and that had a substantial adverse effect on the claimant's ability to carry out day to day activities) until December 2021. A manager discussing concerns a line report has about anxiety and stress, and the reasons the manager concludes for this, is not the same as that manager having knowledge of a mental impairment which satisfies section 6, given they constitute elements a claimant must communicate to the manager to satisfy this definition (we set out the elements in our explanation of section 6 above). The context is also relevant; the claimant's discussions with Mr Roberts followed the impact of Covid, where many employees were experiencing challenges. Given this context and what the claimant told Mr Roberts at the time about how he was feeling, (which he spoke about in the context of the upset he felt as a result of Mrs Hickman's claim) we conclude that Mr Roberts and the claimant's other managers and colleagues did not have constructive knowledge of his mental impairments to the extent required to satisfy the section 6 definition.

193. The respondent accepts that Mr Eyles was disabled by reason of chronic inflammatory bowel disease and dumping syndrome from the start of his employment (9 March 2020).

Direct Disability Discrimination

194. Next we consider the factual allegations we have found happened as alleged by the claimant (taking his case at its highest, mindful some of the dates suggested by him in case management are not accurate) and consider whether the actions of the respondent satisfy the legal test of direct disability discrimination.

Pulling rank comment

195. We have found that Mr Roberts did say *"I don't want to pull rank but I'm a B2, you need to show me some respect"* at a meeting on 12 April 2021. We have accepted that the claimant did find this comment belittling. We have also accepted that Mr Roberts did not intend it in this way; he was seeking to take control of a meeting in which, we have found, the claimant and Mr Roberts were talking over each other and the claimant was not listening to what was being said to him.

196. We must consider whether Mr Robert's words amounted to, "less favourable treatment". The legal test we must apply is did Mr Roberts treat the claimant less favourably than he treated or would have treated someone in the claimant's role, who did not have the claimant's mental or physical impairments, who was talking over Mr Roberts and not listening. Mrs Colquhoun told us she had heard Mr Roberts use this phrase previously. Furthermore, someone who did not have knowledge of the claimant's mental impairments and we have found that Mr Roberts did not have knowledge of the claimant's mental conditions until December 2021, would not take this into account. Therefore we conclude the claimant was not treated less favourably. Mr Roberts would have treated anyone talking over him in this context in the same way, by making this comment or similar to regain control and order in a meeting.

197. We note that, in a claim of disability discrimination, the burden of proof is on the claimant to show *Ayodele v Citylink Ltd & Anor* [2017] EWCA Civ 1913. Mindful the claimant was not represented, and of our duty pursuant to rule 3(1)(a) of the Employment Tribunal Procedure Rules 2024 to ensure parties on an equal footing, we explained this to at the start of the hearing. We repeated our guidance during the hearing noting that, when asked why he considered the alleged conduct related to his disabilities, the claimant spoke of the consequences on his mental health after the conduct and did not explain why he considered the alleged perpetrator was motivated to behave in the alleged way to him because of his disabilities.

198. We explained that only if the claimant is able to identify something more than the existence of his disability and the respondent's conduct do we consider the respondent's explanation. The claimant did not provide anything more than the existence of his disabilities and Mr Robert's comments. He spoke of the impact of Mr Roberts comments on his mental health; we explained evidence to this point is not relevant unless any claims succeed and we must consider remedy. The claimant could not explain why he considered Mr Roberts comments were motivated by his disabilities. Indeed, as a matter of chronology we conclude this could not have been Mr Roberts' motivation as we have found he did not know the nature and extent of the claimant's mental health conditions until December 2021.

199. Notwithstanding we have concluded that Mr Roberts did not treat the claimant less favourably than he would have treated someone with his disabilities, mindful of the guidance in the case of *Nagarajan v London Regional Transport* [2000] 1 AC 501 we have considered the "mental processes" of Mr Roberts. We are mindful the claimant's disabilities need not be the *only* reason for the less favourable treatment provided that the decision to *"pull rank"* was significantly (that is, more than trivially) influenced by the claimant's disabilities.

200. We have found there is no evidence that Mr Roberts was motivated by the claimant's physical conditions. We have found he did not know about the claimant's mental conditions at this time, so we must conclude he could not have been motivated by these. He was motivated by the claimant talking over and not listening to him to recover order in the meeting.

201. For these reasons, we conclude that this complaint of direct disability discrimination fails.

Removal of Sennelager team from claimant's management

202. We have found that Mrs Stone was involved in the decision to remove the claimant's Sennelager team and this decision was made on 2 February 2021. We conclude Mrs Stone did not treat the claimant less favourably than she would have a DAS Manager in the claimant's role without his disabilities. We have found Mrs Stone proposed a restructure which was approved by her seniors in the chain of command (by AC Savage Stuart Nash, Brigadier Bartholomew) and it was taken for operational reasons as it was decided that there was a need to restructure the teams. Given these reasons, we conclude that the decision would have been taken to remove the Sennelager team from a hypothetical manager without the claimant's disabilities.

203. Again, the claimant told us about the upset he felt as a result of this decision and how the loss of his Sennelager team adversely impacted his mental health. However, he could not suggest any reason why those taking the decision were motivated by his mental and physical conditions to remove his team. We conclude they were not. They did not know about his mental conditions until December 2021. We conclude the only reason for the restructure was operational.

204. For these reasons, we conclude that this complaint of direct disability discrimination fails.

205. We have found that Mr Roberts was involved in the implementation of the decision to remove the claimant's Sennelager team and that he had conversations with the claimant about this around April 2021. At this time, while Mr Roberts knew the decision would upset the claimant, we have found that he was not aware of the claimant's mental health disabilities to the extent required by the section 6 definition. We have found that Mr Roberts was following Mrs Stone and the chain of command's orders to implement their decision. We conclude he would have implemented the decision had the DAS manager not have the claimant's disabilities. There was no less favourable treatment.

206. In any event, the claimant has not explained why he says Mr Roberts was motivated by knowledge of the claimant's physical conditions (he did not know about the mental conditions until December 2021) to implement the removal of the team. Indeed, we have found that at the time this decision was being implemented (April 2021), in his draft grievance the claimant described Mr Roberts as *"a great source of support".* This simply does not accord with the claimant's allegation that, at this time, Mr Roberts was motivated by the claimant's disabilities to discriminate against him by implementing someone else's decision to remove the Sennelager team.

207. For these reasons, we conclude that this complaint of direct disability discrimination fails.

Shapefest attire

208. We have found that Mr Roberts said to the claimant at the September 2021 Shapefest *"I see you have your work clothes on."* We must consider whether Mr Roberts' comment amounted to "less favourable treatment". The legal test we must apply is: did Mr Roberts treat the claimant less favourably than he treated or would have treated someone in the claimant's role wearing the same attire to Shapefest, who did not have the claimant's mental or physical impairments? Given the evidence before us that there was banter about what people wore (indeed, by his own admission at the hearing the claimant told us he engaged in this telling us he joked about wearing a mankini for Lady Bathurst's visit) we conclude that the claimant was not treated less favourably. Mr Roberts would have made the same comment had the claimant not had his disabilities.

209. In any event, while the claimant spoke of the impact of this comment on him (and specifically his wife's reaction to the comment) he did not identify the reason he says Mr Roberts was motivated by his disabilities in making the comment. Indeed, he accepted that he did not tell Mr Roberts that he wore casual clothes in the workplace due to his physical conditions and at this time we have found Mr Roberts was not aware of the claimant's mental conditions. Therefore, we must conclude the comment was not related to the claimant's disabilities.

210. For these reasons, we conclude that this complaint of direct disability discrimination fails.

DIO ESH Housing Manager post

211. We have found that the claimant was rejected for an interview for the post of DIO ESH Housing Manager post in November 2022. We must consider whether this treatment amounted to, "less favourable treatment". The legal test we must apply is: did Mr Roberts treat the claimant less favourably than he treated or would have treated someone in the claimant's role, who did not have the claimant's mental or physical impairments? We conclude that an applicant presenting the claimant's application but without his disabilities would also have been rejected without interview; therefore the claimant was not treated less favourably.

212. In any event we have found that Mrs Wood had not made the link between the claimant's application and that he was the DAS manager being discussed at the meeting she attended to support Mrs Colquhoun (the claimant's "something more" to link the decision to his disability). Furthermore, Mrs Wood's conclusion that the claimant had not met the essential criteria in his application to progress to interview had also been signed off by Mrs Hinton, who had no prior knowledge of the claimant.

213. For these reasons, we conclude that this complaint of direct disability discrimination fails.

SO2 post in Sennelager as a Field Contract Repair Department Manager

214. We have found, and the respondent accepts, that in March 2023 it did withdraw the job offer made on 7 December 2022 of a SO2 post in Sennelager as a Field Contract Repair Department Manager. The respondent accepts, and we have found, it did so on medical grounds, namely grounds of alcohol misuse disorder and self-harm which the respondent was advised by medical professionals could not be supported in the locality of the Sennelager base. In all the circumstances known to the respondent and Mr Kelly-Smith at that time, we conclude that the claimant was not treated less favourably. Mr Kelly-Smith would have withdrawn the job offer from an applicant who could not be medically supported due to alcohol misuse disorder and self-harm even if that hypothetical applicant did not have the claimant's mental and physical health conditions. We have accepted Mr Kelly-Smith's evidence that Sennelager is an isolated posting, the job demanding and it would not be in an applicant's or the respondent's best interests to appoint someone who could not be medically supported.

215. While the claimant disagreed that he could not be medically supported (which is not a matter for this Tribunal) he did not explain why the decision related to his mental health conditions. Indeed, Mr Kelly-Smith told us he did take the claimant's attempted suicide into account, which informed the medical advice and his own conclusion that the claimant could not be medically supported and Sennelager was not a suitable base for the claimant given his mental health conditions. However, the decision would have been made had he not had these conditions given the main reason for the decision was clinical advice that the claimant's ongoing alcohol use could not be supported locally and this was a risk the respondent could not take given the history at this base.

216. For these reasons, we conclude that this complaint of direct disability discrimination fails.

<u>Harassment</u>

217. Next we consider the factual allegations we have found happened as alleged by the claimant (taking his case at its highest, mindful some of the dates suggested by him in case management are not accurate) and consider whether the actions of the respondent satisfy the legal test of direct disability discrimination.

Pulling rank comment

218. We have found that Mr Roberts did say *"I don't want to pull rank but I'm a B2, you need to show me some respect"* at a meeting on 12 April 2021. We have accepted that the claimant did find this comment belittling. We have also accepted that Mr Roberts did not intend it in this way; he was seeking to take control of a meeting in which, we have found, the claimant and Mr Roberts were talking over each other and the claimant was not listening to what was being said to him.

219. The claimant was very upset by this comment, which was acknowledged by Mrs Colquhoun who also attended the meeting. We conclude the comment was unwanted. Indeed, in his internal grievance findings Mr Cook concluded that the comment was demeaning. However, while the comment impacted the claimant's mental health (which is acknowledged by Mr Cook in is findings) there is no evidence before us that the comment was motivated by the claimant's physical or mental conditions. At this time we have found that Mr Roberts was not aware of the claimant's mental conditions. Furthermore. having examined the evidence of the internal investigation extensively, Mr Cook concluded that Mr Roberts behaviour was not motivated by the claimant's disabilities.

220. For these reasons, we conclude that this complaint of harassment related to disability fails and we do not need to consider whether the comment had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Removal of Sennelager team from claimant's management

221. We have found that Mrs Stone was involved in the decision to remove the claimant's Sennelager team and this decision was made on 2 February 2021. We have also found that Mr Roberts was involved in the implementation of the decision to remove the claimant's Sennelager team and that he had conversations with the claimant about this around April 2021.

222. To have part of a team removed is unwanted and it caused the claimant considerable upset at the time, and it was evident to us at the hearing that it continues to do so. However, there is no evidence that the decision related to the claimant's disabilities. We have found the decision and its implementation resulted from an operational decision taken higher up the chain of command than Mrs Stone and Mr Roberts. We have found the claimant's mental conditions were not known to the respondent at this time. There is no evidence that the claimant's physical conditions were a factor in any of the decisions taken. The only motivation was restructuring to reduce cost to the tax payer of these operations.

223. For these reasons, we conclude that this complaint of harassment related to disability fails and we do not need to consider the subsequent elements (of section 26 Equality Act 2010).

Shapefest attire

224. We have found that Mr Roberts said to the claimant at the September 2021 Shapefest *"I see you have your work clothes on."* The claimant found

this comment unwanted. In his grievance findings Mr Cook agrees. However, there is no evidence before us that the comment was motivated by the claimants physical or mental conditions. By his own admission, the claimant had not told Mr Roberts he needed to wear casual clothes due to his physical conditions. At this time we have found that Mr Roberts was not aware of his mental conditions. While we agree with Mr Cook that the comment was ill-advised in a public setting and social event, we have found the comment was made in the context of the fact the claimant dressed this way in the store and office. It was not connected to his disabilities, something Mr Cook also concluded in his internal findings.

225. For these reasons, we conclude that this complaint of harassment related to disability fails.

Separation of claimant and Mr Roberts

226. We have found that the respondent removed the claimant from Mr Robert's line management but did not separate them physically in December 2021 as the claimant had not requested this and his wish and the OH advice was that he should return to his role on a phased return. The claimant told us the failure to separate was unwanted and that he should not have been made to work in the vicinity of Mr Roberts, given some of the December 2021 grievance allegations were about him.

227. There is no evidence that the failure to separate was motivated by any knowledge of the claimant's physical or mental conditions. The claimant accepted he had not requested to be separated. None of the allegations had been upheld against Mr Roberts at this time and the respondent had taken action by removing Mr Roberts as the claimant's line manager given the contents of his grievance. Indeed, we have found (as did Mr Cook) that the claimant did not allege the events about which he complains in his December 2021 were motivated by any knowledge the alleged perpetrators had of his physical and mental conditions.

228. For these reasons, we conclude that this complaint of harassment related to disability fails.

1 July 2022 meeting: Mr Roberts and Ms Annis

229. We have found that Mr Roberts did comment about the claimant having a friendly management style and questioned it to the extent he did not consider it a managers role to be everyone's friend due to the role of a manager sometimes having to make difficult decisions. This is not unwanted conduct; Mr Roberts was expressing an opinion in the context of being interviewed in the December 2021 grievance process. The claimant received a copy of the interview and has taken issue with a comment, interpreting to mean that Mr Roberts was questioning his ability to manage a team. That is not what Mr Roberts says and we have found he is not expressing an opinion about ability only style.

230. In any event, we found there is no evidence before us, and the claimant has not provided any explanation, as to why he considers the comments were motivated by his physical or mental conditions.

231. For these reasons, we conclude that this complaint of harassment related to disability fails.

June 2022 OH report

232. We have found that Mrs Woffinden did not "leak" details of the claimant's June 2022 Occupational Health Report to Mr Roberts without consent. We have found that she share some information from the report without first obtaining the claimant's agreement. While we have found Mrs Woffinden was motivated to do so to facilitate the claimant's wish to return to work (in the context of OH advice that he was not fit to do so) her actions were unwanted. In reaching this conclusion we have taken account of the decisions in *Reed and anor v Stedman* [1999] UKEAT 443 97 1102 and *Insitu Cleaning Co Ltd vHeads* [1995] IRLR 4, EAT and the guidance that the word unwanted is essentially the same as 'unwelcome' or 'uninvited'. The implication being that whether the conduct is unwanted should largely be assessed subjectively i.e. from the employees point of view. For this reason, notwithstanding the motivation was well-intended, we have taken account of the claimant's feeling that Mr Roberts call about his welfare was recorded in his medical notes and have concluded that Mrs Woffinden's sharing of some details was unwanted.

233. The disclosure did relate to the claimant's mental conditions; the information shared related to an OH report detailing the claimant's mental health conditions and the information received, while not specifically attributed to the claimant, was received around the time Mr Roberts made the welfare call.

234. We have considered the case of *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495* (EAT), that there must:

> *"be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be"* (per HHJ Auerbach at para.25).

235. Applying this guidance and the Court of Appeal's 2 stage test in *Igen Ltd v Wong* [2005] EWCA Civ 142 we conclude that the claimant has established facts from which a Tribunal can determine that an unlawful act of discrimination has taken place meaning the burden of proof shifts to the respondent to provide a non-discriminatory explanation for the conduct.

236. We conclude that Mrs Woffinden has provided a non-discriminatory explanation for sharing the information. We have found that she was in an untenable position due to conflicting advice in the OH report, namely that the

clinician's assessment *"Mr Eyles is temporarily unfit for work. However Mr Eyles reports that work keeps him focused and being absent from work would likely cause a further decline in his symptoms".* Faced with this contradictory advice Mrs Woffinden told us she was trying to do what was best for the claimant, mindful that he had expressed he wanted to return to work, contrary to an OH assessment that he was unfit to do so at that time; understandably she needed further clarification and support given this conflict. She told us she was mindful that it was Mr Roberts who bore the risk (up the chain of command) if the claimant did return to work against OH advice so she sought advice. We conclude she had a non-discriminatory reason for sharing the information.

237. For these reasons, we conclude that this complaint of harassment related to disability fails.

7 October 2022 store visit

238. We have found that on 7 October 2022 Mrs Stone and Mr Roberts visited the stores to check an issue with the roof and crossed paths with the claimant, whose hand Mr Roberts attempted to shake. Mrs Stone told us the claimant was extremely upset by this. We conclude the offer of a hand shake was unwanted. However, there is no evidence presented by the claimant that this offer was motivated by his disabilities. Indeed, the claimant told us that he considered that Mr Roberts was seeking to absolve himself from the grievance outcome findings. Given the motivation suggested by the claimant, we find the conduct related to the December 2021 grievance, not the claimant's disabilities.

239. For these reasons, we conclude that this complaint of harassment related to disability fails.

11 October 2022 store visit

240. We have found that on 11 October 2022 Mrs Woffinden visited the claimant in the stores to check on his welfare, accompanied by Mr Roberts at his request. The claimant asked Mr Roberts to leave and Mr Roberts asked to know why, both becoming agitated and raising the tone of their voices to match the others in this exchange. Entering the office and asking why he was being asked to leave was unwanted. While we have considered Mr Robert's request to accompany Mrs Woffinden and question about why he was being asked to leave ill advised, there is no evidence he was motivated in either of these actions by knowledge of the claimant's disabilities. The claimant could not identify something more, focusing only on the impact of these action on his mental health when asked how the actions related to his disabilities. We have found Mr Roberts's actions related to the outcome of December 2021 grievance.

241. For these reasons, we conclude that this complaint of harassment related to disability fails.

Rejection for an interview for DIO ESH Housing Manager

242. It is agreed that the claimant was rejected for an interview for DIO ESH Housing Manager post in November 2022; this is unwanted conduct. The claimant suggested it related to the fact (he says) that Mrs Wood knew he was the DAS manager who brought the grievance against Mrs Colquhoun. Notwithstanding we have found that this motivation is the claimant's perception it does not, in any event, relate to the claimant's disabilities. The rejection of his application was because the claimant's application did not adopt the recommended STAR approached advised by the civil service and, following Mrs Wood and Mrs Hinton separately scoring it, his application did not meet the benchmark score required to progress to interview.

243. For these reasons, we conclude that this complaint of harassment related to disability fails.

SO2 post in Sennelager Field Contract Repair Department Manager post

244. It is accepted that in March 2023 the respondent withdrew the job offer made on 7 December 2022 of an SO2 post in Sennelager as a Field Contract Repair Department Manager on medical grounds, namely grounds of alcohol misuse disorder and self-harm. The withdrawal of the offer was unwanted by the claimant. It related to the claimant's disabilities in that Mr Kelly-Smith took account of the link between alcohol abuse disorder, mental health and self-harm in concluding it was in the claimant's and respondent's interests to withdraw the offer. However, the respondent by Mr Kelly-Smith's evidence has clearly explained the non- discriminatory reason this decision was taken. It was not in either party's interests to deploy the claimant to an isolated base in Germany where they have been some suicides, to do a demanding and isolated role when medical professionals had concluded the claimant's alcohol use and self-harm could not be medically supported.

245. For these reasons, we conclude that this complaint of harassment related to disability fails.

Leaving presentation

246. It is accepted that on 16 July 2023 the Claimant was not presented with a Good Luck card or presentation. Subjectively this was unwanted conduct as the claimant was upset that his departure from SHAPE was not formally recognised. There is no evidence the reason he did not receive a card or presentation was due to his disabilities. His line managers were off sick at this time so could not organise. In any event, it was discretionary for colleagues to arrange this; Mrs Colquhoun told us she did not receive a card or have a presentation when she left in July 2024.

247. For these reasons, we conclude that this complaint of harassment related to disability fails

<u>Disability Related Discrimination</u>

248. It is accepted that the claimant had periods of ill health as a consequence of his mental disabilities and that in this regard the associated self-harm meant that doctors deemed him medically unsupportable for the post in Germany. At the hearing the claimant accepted that he did not tell Mr Roberts

or any line manager that he needed to wear less formal clothing as a consequence of his physical impairments. We have found there is no evidence that Mr Roberts or any of his managers considered him less capable as a result of his physical or mental disabilities.

Shapefest attire

249. We have found that Mr Roberts said to the claimant at the September 2021 Shapefest *"I see you have your work clothes on".* We have found that this comment was not made because of the claimant needing to wear casual clothes as a result of his physical conditions. The claimant admitted he did not tell Mr Roberts that the requirement to wear casual clothes was due to his physical conditions. Therefore, it follows Mr Roberts comment, considered unfavourable by the claimant, hence including it as a complaint in his December 2021 grievance, could not have arisen as a result of the clothing requirement.

1 July 2022 meeting: Mr Roberts and Ms Annis

250. We have found that Mr Roberts did comment about the claimant having a friendly management style and questioned it to the extent he did not consider it a managers role to be everyone's friend due to the role of a manager sometimes having to make difficult decisions. We have found Mr Roberts expressed this opinion in his investigation meeting with Ms Annis. The comments were not unfavourable and had nothing to do with any of the things the claimant says arose in consequence of his disabilities. Mr Roberts was explaining his relationship with the claimant and expressing views on his management style.

251. We have found that on 26 November 2022 Mrs Woffinden tried to arrange a Continuous Absence Review Meeting as a result of the Claimant being sick from 18 October – 27 November 2023. She was following policy. The trigger was the length of the claimant's sickness leave, which arose in consequence of mental health conditions. However, the letter inviting the claimant to a Continuous Absence Review Meeting was not unfavourable treatment; it was sent to anyone reaching the same level of sickness absence to discuss the reasons for that absence, measures to support an employee's return to work and any possible outcomes if that could not be achieved.

252. We have found that on 10 January 2023 Mrs Woffinden arranged a Formal Absence Review Meeting in relation to the previous year's sickness absence. Again this arose due to the claimant's sickness absence which was a consequence of his mental health conditions. In fact, the claimant returned to work on 5 January, so the meeting was changed to a return to work meeting.

253. In all the circumstances we find that the respondent had a legitimate aim in sending these invitations. Following policy, it was aiming to facilitate the claimant's return to work ensuring a safe and appropriate working environment for its employees and if this was not possible, consider alternative steps to ensure the need to run and provide an efficient service.

254. We have found that in March 2023 the respondent withdrew the job offer made on 7 December 2022 of an SO2 post in Sennelager as a Field Contract

Repair Department Manager on medical grounds on grounds of alcohol misuse disorder and self-harm. This decision arose as the claimant was deemed by professional medical opinion to be medically unsupportable. We have found this arose in consequence of his use of alcohol and previous incidences of self-harm, both of which were considered in the context of his mental health conditions. While the withdrawal was unfavourable to the claimant personally, the respondent had a legitimate aim for withdrawing the offer, specifically enabling the effective accomplishment of the various functions of the respondent and ensuring the health and safety of its staff.

255. For these reasons, the complaints of disability related discrimination fail.

Failure to Make Reasonable Adjustments

256. The claimant alleges that the respondent had a practice of requiring him to work in an office. By his own admission, from the start of his employment the claimant was allowed to work in the stores. The issue arose when the roof of the stores was being repaired. The claimant clarified his complaint that the respondent failed to make a reasonable adjustment telling us that the practice of requiring him to work in an office was only put in place in January 2023 when work started on the stores' roof. The respondent accepts this was the case for the duration of the work.

257. We must consider whether this practice put the claimant at a substantial disadvantage in comparison with persons who are not disabled at any relevant time. He told us that the disadvantage was that working in the store would mean he may cross paths with Mr Roberts (against whom Mr Cook had upheld some the claimant's grievances) and he was *"unable to cope with the stress of facing him".*

258. While the prospect of seeing Mr Roberts may have upset the claimant, by his own admission this was due to the allegations being upheld and not inherently due to his physical or mental conditions. We have found (and agree with Mr Cook's finding) that the claimant did not suggest in the grievance that the events about which he complained were motivated by any knowledge of his physical or mental conditions by the alleged perpetrators. Therefore, we conclude the disadvantages cited by the claimant are not related to his disabilities.

259. In any event we have found the claimant did not request a reasonable adjustment to work from home. He was allowed to do so on 5 and 6 January 2023 as part of a phased return and again on 10 January when he told Mrs Woffinden he was not feeling well. He also accepted that as Mr Roberts was on a period of sick leave in January 2023 which lasted until the end of the claimant's SHAPE posting, there was no risk he would encounter Mr Roberts in the office. Therefore, in the circumstances at that time there was no disadvantage to the claimant of working in the office.

260. For these reasons, the complaint that the respondent failed to make reasonable adjustments to accommodate the claimant's disabilities fails.

Victimisation

261. First, we must apply the legal test for a protected act (section 27(2) of the Equality Act 2010) to determine whether the 3 communications relied on by the claimant constitute protected acts.

262. We have found that the claimant's April 2021 email to Mrs Stone (which we have found was not sent to Mr Roberts, as alleged) sets out the claimant's concerns over Mrs Hickman comment that some of the practices within his team were bordering on fraudulent. We have found that the claimant complains about the fact that Ms Hickman raised concerns there may have been fraudulent activity on the claimant's team. Specifically, the claimant raises concerns about his professional integrity and how it distressed him. Taking the claimant's case at its highest, in which we have also considered the draft grievance, we have found that neither document references the claimant's PTSD, depression, paranoia or anxiety nor his physical conditions in this email or suggest that the issues with Mrs Hickman were motivated by or occurred as a consequence of these conditions.

263. The respondent accepts the December 2021 grievance constitutes a protected act. We disagree. Section 27(2)(a) of the Equality Act 2010 defines a protected act as bringing proceedings under this Act; we consider the following relevant to consider in respect of the December 2021 grievance:

"27(2)(c)doing any other thing for the purposes of or in connection with this Act;
27(2)(d)making an allegation (whether or not express) that A or another person has contravened this Act."

264. Mr Cook concluded that the December 2021 grievance was not related to the claimant's disabilities. We agree. Further, he does not refer to any other protected characteristics in this document. Therefore we conclude that the grievance does not satisfy the requirements of subsections 2 (c) or (d) of section 27 of the Equality Act 2010. The December 2021 grievance is not a protected act. In any event, by chronology, the factual allegations we have upheld below predate the grievance.

265. The respondent accepts the February 2022 ET proceedings constitute a protected act. We agree. Section 27(2)(a) of the Equality Act 2010 defines a protected act as bringing proceedings under this Act.

266. Therefore we must consider whether any of the detriments on which the claimant relies, which we have found happened as a matter of fact and constitute a detriment, happened because the claimant issued proceedings in the Employment Tribunal.

267. We have found that, as a matter of fact, Mr Roberts did not make the decision to remove the Claimant's responsibility for the Sennelager team on May 2021 or at all. The decision was made higher up the chain of command by Mrs Stone with the approval of AC Savage, Stuart Nash and Brigadier Bartholomew. As the event did not happen as alleged it cannot amount to a detriment.

268. We have found Mr Roberts was tasked with the implementation of that decision in April 2021. This cannot have happened because the claimant commenced proceedings as the implementation predates the proceedings.

269. We have found the claimant's 3 year tour based at SHAPE was not extended for a further 2 years and he was told his on 5 September 2022. To not have the tour extended was a detriment to the claimant. However, we have found that the reason it was not extended was due to an operational restructuring decision made by Mrs Stone, and approved by AC Savage that the role was no longer required. There is no evidence that this decision was related to the claimant commencing these proceedings.

270. For these reasons the complaint of victimisation fails.

271. Therefore, it is the unanimous decision of this Employment Tribunal that:

271.1. The claimant was a disabled person as defined by section 6 Equality Act 2010 because of PTSD, Depression, Anxiety and Paranoia from 3 December 2021.

271.2. The complaint of direct disability discrimination is not well-founded and is dismissed.

271.3. The complaint of harassment related to disability is not well-founded and is dismissed.

271.4. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

271.5. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

271.6. The complaint of victimisation is not well-founded and is dismissed.

APPROVED BY:

Employment Judge Hutchings

28 May 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON
29 May 2025

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/